Modern Reports,

OR

SELECT CASES

Adjudged in the

COURTS

OF

Kings Bench, Chancery, Common-Pleas, and Exchequer, fince the Restauration of

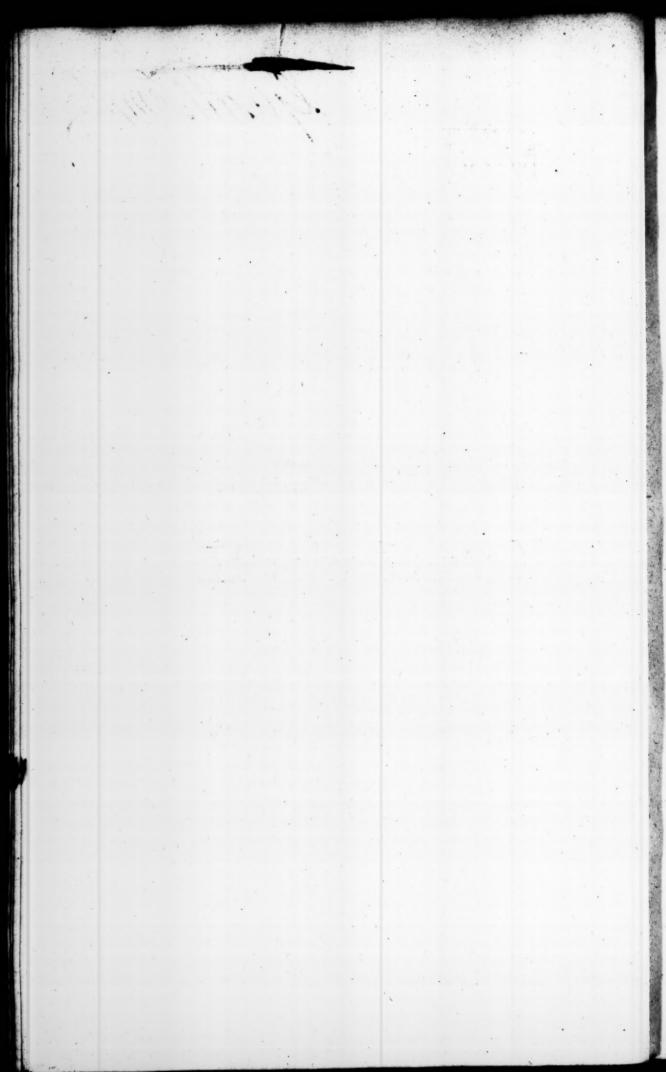
HIS MAJESTY

King Charles II.

Collected by a Careful Hand.

LONDON,

Printed for T. Basset, J. Wright, R. Chiswell, and S. Heyrick. MDC LXXXII.



THE

PUBLISHER

TOTHE

READER.

Hese Reports (the first except the Lord Chief Justice Vaughans Arguments that have been yet printed of Cases adjudged since His Majesties happy Restauration) though they are not Publisbed under the Name of any Eminent Person, as some other Spurious Ones have been, to gain thereby a Reputation, which in themselves they could not Merit; yet have been Collected by a Person of Ability and Judgment, and Communicated to several of known Learning in the Laws, who think them not Inferior to many Books of this Nature which are admitted for Authority. A great and well-spread Name may be Requisite to render a Book Authentick, and to defend it from that common Censure, of which this Age is become so very liberal. But its own worth is that only which can make it Useful and Instructive.

The Reader will find here several Cases (as well such as have been Resolved upon our modern Acts of Parliament, as others relating to the Common Law) which are primæ Impressionis, and not to be found in any of the former Volumns of the Law; and the Pith and Substance of divers Arguments, as well as Resolutions of the Reverend Judges, on many other weighty and difficult

Points.

The Epistle.

And indeed, though in every Case, the main thing which it behoves Us to know, is, what the Judges take and define to be Law: yet the short and concise way of reporting it, which is affected in some of our Books, doth very scantily answer the true and proper end of reading them; which is not only to know what is Law, but upon what Grounds and Reasons' tis adjudged so to be; otherwise the Student is many times at a loss, and left in the dark; especially where he finds other Resolutions which seem to have a tendency to the contrary Opinion.

In this respect, these Reports will appear to be more satisfactory and inlightning than many others: several of the Cases (especially those of the most important Consideration) containing in a brief and summary way what hath been offered by the Counsel Pro and Con, and the Debates of the Reverend Judges, as well as their Ultimate Resolutions; than which nothing can more Contribute to the Advantage of the studious Reader, and to the setling and guidance of his judgment, not only in the Point controverted, but likewise in other matters of Law, where the Reason is the same. Ubi eadem ratio,

idem jus.

As to the truth of these Reports, though the modesty of the Gentleman who Collected them, hath prevailed above the importunity of the Book-Seller, and he hath rather chosen to see his Book, than himself gain the Publick Acceptation and Applause, whereby it hath lost some seeming Advantage, which the presizing of his Name would have undoubtedly given it; yet the Reader may rest assured, that no little Care hath been taken to prevent any Mistakes or Mis-representations. The Judgments having been examined, and the Authorities here cited industriously compared with the Books out of which they were taken.

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The Cases of Trin. Term, 29 Car. 2. in Com. B. end with page 270. and from that page to page 299. through a missake of the Composer, it's printed C. B. instead of B. R. which the Reader is desired to to amend with his Pen.

to amend with his Pen.

REPORTS

Of divers

Select Cases

In the Reign of

CAROLI II.

Term. Mich. 21 Car.II. 1669. in Banco Regis.

Me Mynn an Attorney entred a Judgment, by colour of a Warrant of Attorney, of another Term then was expressed in the Warrant; The Court consulting with the Secondary about it, he said, That if the Warrant be to appear and enter Judgment as of this Term or any time after, the Attorney may enter Judgment at any time during his life; but in the case in question the Warrant of Attorney had not those words, or at any time after: Wherefore the Secondary was ordered to consider the charge of the party grieved, in order to his reparation. Which the Court said concluded him from bringing his Action on the Case.

The Secondary said, That in Trin. & Hil. Term they could not compel the party in a Habeas Corpus to plead and go to Trial the same Term, but in Michaelmas and Easter Term they could.

Dr. Solicitor moved for a new Writ of Enquiry into London, and to flay the filing of a former, because of excellive damages given; but it was denied.

An Affidavit for the changing of a Venue made before the party was Arrested, and allowed.

Doved in Battery for putting an Arm out of joint, that the party might be held to special Bail; but denied. Twild. Follow the course of the Court.

Hr. Sanders moved to quath an Diver made by the Justices of Peace for putting away an Apprentice from his Haster, and ordering the Paster to give him so much Honey. Keeling. The Statute of 5 Eliz. leaves this to their discretion.

An Indiament was preferred in Chelter tot a Perjury committed in London: For which Keeling threatned to have the Liberties of the County Palatine leized, if they kept not within their bounds.

Goodwin & Harlow.

E Broz to reverse a Judgment in Colchester, there being no appearance by the party, but Judgment upon the defaults recorded. Revers'd.

Twild. If there be a Judgment against their, you cannot take out Execution against one or two.

Upon a motion for a new Trial Twisden said, That in his practice the speir in an Action of Debt against him upon a Bond of his Ancestor, pleaded riens per discent; the Plaintiss knew the Defendant had levied a fine, and at the Trial it was produced: but because they had not a Died to lead the uses, it was urged that the use was to the Conusor, and his heirs, and so the heir in by descent: whereupon there was a Aerosa against him; and it being a just and due Debt, they could never after get a new Trial.

Gostwicke

Gostwicke & Mason.

pear, quamdiu ambabus partibus placuerit; there was a Aerdia foz the Plaintiff foz two years rent. Sanders moved in Arrest of Judgment, that the Plaintiff alledges indeed that the Defendant entred and was possess the first year, but mentions no entry as to the second. Twisd. The Jury have found the Rent to be due foz both years, and we will now intend that he was in possession all the time foz which the Rent is found to be due.

A Prohibition was prayed to the Ecclesiastical Court at Chester to stay proceedings upon a Libel against one William Bayles, for teaching School without Licence; but it was denied.

Redman & Edolfe.

Respass and Ejectment by Disginal in this Court. Sanders moved in Arrest of Judgment, upon a fault in the Disginal: for a bad Disginal is not help'd by Aerdic. But upon Hr. Livesey's certifying that there was no Disginal at all, the Plaintist had Judgment, though in his Declaration he recited the Disginal.

In an Action of Asault and Battery and Mounding; the Evidence to prove a Provocation, was, That the Plaintist put his hand upon his Sword and said, If it were not Assize time. I would not take such Language from you: The question was, if that were an Asault? The Court agreed that it was not: for he beclared, that he would not Asault him the Judges being in Town; and the intention as well as the act makes an Asault. Therefore if one strike another upon the hand or arm, or breast, in discourse, its no Asault, there being no intention to Asault: But if one intending to Asault, strike at another and mils him, this is an Asault: so if he hold up his hand against another and say nothing, it is an Asault. In the principal case the Plaintist had Judgment.

23 2

Medlicott

Medlicott & Joyner.

L Jectione firms. The Plaintiff at the Trial offer d in Evidence a Copy of a Dood that was burnt by the fire; the Copy was taken by one Mr. Gardner of the Temple, who faid he did not examine it by the Diginal, but he wit it, and it always lay by him as a true Copy: and the Court agreed to have it read; the oxiginal Dood being proved to be burnt. Twild. Feofie upon Condition is diffeiled, and a fine levied, and five years pals; then the Condition is broken: the feofic may enter, for the Diffeilor held the Estate subject to the Condition, and so did the Conizee, for he cannot be in of a better Estate then the Conizor himself was.

Dawe & Swayne.

M Action upon the Case was brought against one for fuing the Plaintiff in placito debiti for 600 l. and fality and maliciously affirming to the Bailist of Westminster, that he did owe him 600 l. whereby the Bailiss indisted upon extraopinary Bail, to his Damage, ec. The Defendant traverles, abique hoc that he did falily and maliciously affirm to the Bailiff of Westminster that he did owe him so much. moved in Arrest of Judgment, that the Action would not lie; But the Plaintiff had Judgment. Keel. If there had been no cause of Action, an Action upon the Case would not lie, because he has a recompence by Law, but here was a cause of Action. If one should arrest you in an Action of 2000 l. to the intent that you hould not find Ball, and keep you from practice all this Cerm, and this is found to be failly and maliciously, shall not you have an Action for this? this Twisden faid he knew to have been Serjeant Rolls his Opinion. Morton. Foxley's case is, That if a man be outlaw'd in another County, where he is not known, an Action upon the Cafe will lye; to an Action lies against the Sheriff, if reasonable Bail be of fered and refused.

Twifd. If three men bring an Action, and the Defendant put in Bail at the Suit of four, they cannot declare; but if be had put in Bail at the fuit of one, that one might declare against him.

Judgment was entred as of Trinity Term for the Queen Mother, and a Africa of Enquity of damages was taken out returnable this Term, and the died in the Macation-time; Refolved, that the first was but an interlocutory Judgment, and that the Action was abated by her death. Twifd. Some have questioned how you shall come to make the death of the party appear between the Aerdick, and the day in Bank; and I have known it offer'd by Affidavit, and by suggestion upon the Roll, and by motion.

Troy an Attorney.

D Information of Extortion against Troy an Attorney; It was moved in arrest of Judgment, That Attorneys are not within any of the Statutes against Extortion, and therefore the Information concluded ill, the conclusion being contra formam Statuti. Twifd. The Statute of 3 Jac. cap. 7. is expels against Attornies. Keel. I think as thus adviced, that Attornies are within all the Statutes of Extortion. was afterwards moved in arrest of Judgment, because the Information was insufficient in the Law: for Sit Tho. Fanshawe informed, that Br. Troy being an Attorney of the Court of Common Pleas, did at Maidstone cause one Collop to be impleaded for 9 s. 4 d. debt, at the fuit of one Dudley Sellinger, &c. and this was ad grave damnum of Collop, &c. but it is not exmelled in what Court he caused him to be impleaded; and that which the Defendant is charged with is not an offence, for he faith that he did cause him to be impleaded, and received the money the same day, and perhaps he received the money after he had caused him to be impleaded: Then it is not lufficiently alledged that he did illicite receive so much, and Extoxion ought to be particularly allevged. Moz is there any Statute, that an Attorney thall receive no more than his The profession of an Attorney is at Common Law, and allowed by the Statute of Westm. 1. cap. 26. and the Sta-

Statute of 3 Jac. does not extend to this matter. Non conflat in this case, if what he received was for fees or no: befives the fuit for an offence against that Statute must be brought by the party, not by Sir Tho. Fanshawe. Keel. If the party grieved will not fue for the penalty of treble damages given by that Statute; pet the King may profecute to turn him out of the Roll. Twifd. I boubt that: nog is it clear, whether an Information will lie at all upon that Statute or not, for the Statute does not speak of an Information. Whenever a Statute makes a thing criminal, an Information will tie upon the Statute, though not given by express Twifd. It appears here, that this money was not received of his Client, for he was against Collop. But he ought to thew in what Court the impleading was; for otherwife it might be before Dr. Major in his Chamber. To which the Court agrad. So the Information was quast'd.

Burnet & Holden.

fendant dye after the day of Nisi prius, and befoze the day in Bank, whether the Judgment thall be said to be given in the life of the Defendant? 2. Admit it thall, yet whether the Erecutor thall have the advantage taken from him, of retaining to satisfie his own debt. To the first it was said, that the Act of Parliament only takes away a Writ of Error in such case, but there is no day in Bank to plead. It was order'd to stand in the paper.

Corporation of Darby.

The Composation of the Town of Darby prescribe to have Common sans number in grosse. Sanders. I conceive it may be by prescription; what a man may grant, may be prescribed so; Co. Lit. 122. is express. Keel. In a forest the King may grant Common sorsheep, but you cannot prescribe sor it. And if you may prescribe sor Common sans number in grosse, then you may drive all the Cattel in a fair to the Com-

Common. Sanders. But the prescription is so, their own Cattel only. Twisd. If you prescribe so, common sans number appurtenant to Land, you can put in no more Cattel then what is proportionable to your Land; so, the Land sints you in that case to a reasonable number. But if you prescribe so, common sans number in grosse, what is it that lets any bounds in such case? There was a case in Glyn's time between Masselden and Stoneby, where Masselden prescribed so, common sans number, without saying levant & couchant, and that being after a Aerdia, was held good; but if it had been upon a Demurrer, it would have been otherwise: Livesey said he was agent so, him in the case.

Bucknall & Swinnock.

Ndebitat. Assumplic for money received to the Plaintiss use; the Defendant pleads specially, that post assumptionem prædictam there was an agreement between the Plaintiss and Defendant, that the Defendant should pay the money to J. S. and he did pay it accordingly. The Plaintiss bemures. Jones. This plea both not only amount to the general issue, but is repugnant in it self. It was put off to be argued.

Hall versus Wombell.

The question was, whether an Action of Debt would lie upon a Judgment given by the Commissioners of Extiste upon an Information before them. Adjornatur.

Vaughan & Casewell.

A Whit of Erroz was brought to reverle a Judgment given at the grand Sessions in Wales, in a Whit of Quod ei desorciat. Sanders. The point in Law will be this; whether a Tenants vouching a Couchee out of the line, be peremptory and final, or that a Responders ouster shall be awarded?

Hr. Jones. In an Affice the Tenant may bouch another named in the Afrit 9 H. 5. 14. and so in the Com. fo. 89. b. but a boucher cannot be of one not named in the Afrit, because it is festinum remedium. In Wales they never allow soreign vouchers, because they cannot bying them in. If there be a Counterplea to a Coucher, and that be adjudged in another Term, it is always peremptony; otherwise, if it be determined the same Term.

An Action of Trover and Convertion was brought against husband and wife, and the wife arrested. Twisd. The wife must be discharged upon Common bail: so it was done in the Lady Baltinglasse's case. And where it is said in Crook, that the Wife in such case shall be discharged, it is to be understood that she shall be discharged upon Common bail. So Livesey said the course was.

It was faid to be the course of the Court, That if an Attorney be sued time enough to give him two Rules to plead within the Term, Judgment may be given, otherwise not.

Ruffell & Collins.

A Nationalit was brought upon two several promises, and entire damages were given. Doved by Dr. Sympson in arrest of Judgment, that for one of the promises an Action will not lie: It was a general indedicatus pro opere facto; which was urged to be too general and uncertain. But per Cur' it is well enough, as promercimoniis venditis & proservitio, without mentioning the Goods of the Service in particular. And the Plaintist had Judgment.

Dyer versus East.

A D Action upon the Case upon a promise for Wares that the wife twk up to her wearing Apparel; Polyxsen moved for a new Crial. Keel. The husband must pay for the wives Apparel, unless the does clope, and he give notice not to trust her: that is Scott & Manby's case: which was a hard Judgment, but we will not impeach it. The Plaintist had Judgment.

Beckett & Taylor.

Debt upon a Bond to submit to an Award. Exception was taken to the Award, because the concurrence of a third person was awarded, which makes it void: They award that one of the parties thall discharge the other from his undertaking to pay a Debt to a third person: and it was pretended that the third person being no party to the submission, was not compellable to give a discharge. But it was antwered that he is compellable, for in case the debt be paid him, he is compellable in equity to give a Release to him that had undertaken to pay it. Rolls 1 part 248. & Giles & Southwards case. Mich. 1653. Judgment nisi.

Seventien Serjeants being made the 4th of November, a bay of two after Serjeant Powis, the Junior of them all coming to the Kings Bench bar, the Lozd Chief Justice Keeling told him, that he had something to say to him, viz. That the Rings which he and the rest of the Serjeants had given, weighed but 18 s. apiece; whereas Fortescue in his book de laudibus legum Angliæ says, That the Rings given to the Chief Justices, and to the Chief Baron, ought to weigh 20s. apiece: and that he spake this not expeding a recompence, but that it might not be drawn into a president; and that the young Gentlemen thete might take notice of it.

Clerke

Clerke versus Rowell & Phillips.

A Trial at bat in Speciment for Lands lettled by Sie Pexall Brockhurst. The Court faid, a Trial against others shall not be grown in Evidence in this cause. And Twisden sate, that an Entry to beliver a Declaration in Exerment should not work to about a fine; but that it must be an eppels Entry? Upon which last matter the Plaintist was non-suit.

Redmans Cafe.

It was moved, that one Redman an Attomey of the Court, who was going into Ireland, might put in special Bail. Twisd. A Clerk of the Court cannot put in bail. You have filed a Bill against him, and so waved his putting in bail. Keel. You may remember Woolly's case; that we discharged him by reason of his publicage, and took Common bail. Twisd. You cannot beclare against him in custodia. But though we cannot take bail, yet we may commit him, and then deliver him out by mainpernancy. Jones. If he be in Court in propria persona, you cannot proced against his bail. The Court agreed that the Attorney should not put in bail.

Grafton.

Rafton, one of the Company of Drapers, was brought in the Habeas Corpus. In the Return, the cause of his Impissorment was allevged to be, for that being chosen of the Livery, he refused to serve. Per Cur' they might have sneed him, and have brought an Action of Dedt for the sum: but they could not impusson him. Keel. The Court of Alberman may impusson a man that shall resule to accept the Office of Alberman, because they are a Court of Record, and they may want Alberman else. So he was released.

It was moved for the Plaintiss, that a person named in the simul cum being a material Mitness, might be struck out, and it was granted. Keel. said, That is nothing was proved against him, he might be a Mitness for the Defendant.

Clerke & Heath.

Jectione firmæ. The Plaintiff claims by a Leafe from Th. Prin, Clerke. Dbiected, That Prin had not taken the Dath according to the Act for Aniformity; whereupon he produced a Certificate of the Bishop that had only a small bit of War upon it. Twifd. If it were fealed, though the Seal be broken off, pet it may be read, as we read Recoveries after the Seal broken off; and I have feen Administration given in Evidence after the Seal broken off, and so wills and Dads. Accordingly it was read. Obj. The Church is ipfo facto boid by the Act of Uniformity, if the Incumbent had no Episcopal Didination. So they shewed that Prin was ordained by a It was likewife proved that he had declared his affent and confent to the Common Prayer in due time, before St. Bartholomew's day. Then it was urged, that the Act does not confirm the Plaintiffs Leffoz in this living; for that it is not a living with Ture of Souls; for it has a Aicarage endowed. Twifd. If it be a living without Cure, the Advoes not extend to it. Or. Solicitor. The Prefentation does not mention Cure of Souls. (So they read a Presentation of a Rectoz, and another of a Aicar, in neither of which any mention was made of Cure of Souls: but the Micars was residendo.) If both be presentative, the Cure shall be intenbed to be in the Aicar. Keeling. Thy may not both have the Cure? Sol. If the Aicar be endowd, the Rector is discharged of Relidence by Act of Parliament. Twifd. Syngdals and Procurations are duties due to the Promary; which Clicars, when the Parlonages are impropriated, always pay: but I question whether they that come into a Church by Diefentation to, and Institution by the Bishop, have not always the Cure of Souls? It is true in Donatives, where the Winisters do not come in by the Bishops Institution, there is no Cure: but they that come in by Institution of the Bithop, have their power delegated to them from him, and

generally have Cure of Souls. Solic. There are several Redozies without Cure. Twild. When came Redozies in? Morton. After the Counsel of Lateran, and Clicars came in in the Seventeenth year of King John. Moreton: 23e= fore the Councel of Lateran, the Bithop Did provide Teachers, and received the Cythes himfelf; but fince he hath appointed others to the charge, and faith, accipe curam tuam & meam. Keeling & Twisden. It is said to by mp Lord Coke, but not done. Twifden. Tathereber there is a Cure of Souls, the Church is vilitable, efther by the Bishop, if it belong to him: if to a Layman, be muft make Delegates : if to the King, my Logo Kapet and where a man comes in by Prefentation, he is prima facie visitable by the Bishop. Keeling. I take it, that whoever comes in under the Bishops Institution. hath the Cure. Twisden. Grendon's Case is express, That the Bishop hath the Cure of Souls of all the Diocess, and both by Institution transfer it to the Parson: so that prima facie, he that is instituted hath the Cure. The Micarage is derived out of the Parlanage; and if the dicar come to poberty, the Parson is bound to maintain him. Twifd. There is an Appropriation to a Corporation; the Corporation cannot have Cure of Souls, being a body Politick; but when they appoint a Clicar, he coming under the Bishop by Institution, hath Cure of Souls: and a Donative, when it comes to be Presentative, hath Cure of Souls. Keeling agreed. Twifd. The hold that when the Rector comes in by Inffitution, the Biffop hath power to vilit him for his Doctrine and his life; for he hath the particular Cure, but the Bishop the general; and that the Bishop hath power to depaire him.

Abbot & Moore.

De Plaintiss declares, That whereas one William Moore was indebted to him 210 l. and whereas the last William Moore had an Annuity out of the Defendants Lands, That the Defendant in consideration that the Plaintiss had agreed that the Defendant should pay so much money to the Plaintiss, the Defendant did promise to pay it. After a Alerbiantiss, the Defendant did promise to pay it.

dict, it was objected in arrest of Judgment, that here was not any consideration; and the Court was of that opinion. Then the Plaintist would have discontinued, but the Court would not luster that after a Aerdict.

Sir Edward Thurland moved to quash an Dider made by the Justices of the Peace for one to serve as Constable in Homeby. Moreton. If a Leet neglect to chuse a Constable, upon complaint to the Justices of Peace, they shall by the Statute appoint a Constable. Twisd. In this case there are Affidavits, that there never was any Constable there. cannot tell whether of no the Justices of Peace can erect a Constablewick where never any was before: if he will not be fwom, let them indid him for not executing the Office, and let him traverle, that there never was any fuch Office there. Keeling. So and be Cwozn, og if the Juffices of the Peace commit you, bring your Action of falle Imprilonment. Twifd. If there be a Court Leet that bath the choice of a petty Con-Nable, the Judices of Peace cannot chuse there: And if it be in the Dundzed, I doubt whether the Juffices of Peace can make moze Constables then were befoze. Digh-Constables were not ab origine, but came in with Juffices of the Peace. to H. 4. Keel. & Morton cont. Moreton. The book of Villarum in the Exchequer fets out all the Uills, and there cannot be a Constablewick created at this day. In this case the Court oydered him to be swozn. Thurk If they chuse a Parliament-mans Servant Conftable, they cannot (wear him. Twifd. I do not think the priviledge extends to the Tenant of a Parliament man, but to his Servant.

Bliffett & Wincott.

Thought up by Habeas Corpus. Twifd. To meet in Conventicles in such numbers as may be affrighting to the people, and in such numbers as the Constable cannot supples, is a breach of the Peace, and of a persons Recognizance for the good behaviour. Pote, this was after the late Act against Conventicles expired.

Lee & Edwards.

D Action upon the Cafe was brought upon two promifes, 1. In consideration the Plaintiff would bestow his labour and pains about the Defendants Daughter, and would cure her, he did promife to pay so much for his labour and vains, and would also pay for the Dedicaments. 2. That in consideration he had cuted her, he did promise to pay, ec. Raymond moved in arrest of Judament, that he did not aver that he had cured her, the confideration of the first promise being future, and both promiles found, and entire damages given. Twifd. It is well enough; for now it lies upon the whole Record, whether he hath cured her or no: if it had rested upon the first promise, it had been nought. And in the second promife there is an averment, that he had cured her. So that now after a Merdict it is help'd, and the want of an aberment is holpen by a Aerdict in many cases. Judgement nifi, &c.

Twisd. If a man be in pisson, and the Parshal dye, and the Pissoner escape, there is no remedy but to take him again.

Twifd. Pleas in abatement come too late after impar-

Hall & Sebright.

A Action of Trespals, wherein the Plaintist declared, That the Desendant on the 24th of January, did enter and take possession of his house, and did keep him out of possession to the day of the exhibiting the Bill; The Desendant pleads, that ante prædict tempus quo, sc. &c. the Plaintist did licence the Desendant to enjoy the house until such a day. Saunders. The plea is naught in substance: for a licence to enjoy from such a time, to such a time, is a Lease, and ought to be pleaded as a Lease, and not as a Licence: it is a certain present Interest. Twisd. It is true 5 H. 7. so. 1. is,

Chat if one both license another to enjoy his house till such a time; it is a Lease; but whether it may not be pleased as a Licence, I have known it voubted. Judgment will, &c.

Coppin versus Hernall.

Wisden sate upon a motion in arrest of Judgment, because an Award was not good, that the Ampirage could not be made, till the Arbitrators time were out: And if any such power be given to the Ampire, its many in its constitution, for two persons cannot have a several Jurisdiction at one and the same time.

The Law allows the Defendant a Copy of the Pannel to provide himself so his challenges.

Fetyplace versus ---

A Ction upon the Case upon a promile, in confideration that the Plaintist wonstrasser; instead of afferre, exit was moved in arrest of Judgment: & Cr. 3 part. 466. was rited Bedel & Wingfield. Twist. I remember districtionem stoy destructionem, cannot be help b: so neither vaccaria instead of vicaria. So the Court gave directions to see if it were right upon the Rost.

Holloway

The Condition of a Bond for performance of Covenants in an Indenture, both effop to lay there is no luch Indenture, but both not effop to lay there are no Covenants.

Keel. The course of the Courtis, that if a man be brought in upon a Latitat for 20 l. or 30 l. we take the bail for no more, but pet he stands bail for all Actions at the same parties suit; otherwise if a stranger bring an Action against him. Twisd. They cannot veclare till he hath put in Bail, and when we take bail, it is but for the sum in the Latitat, perhaps 30 l. or 40 l. but when he is once in, he may be veclared against for 200 l.

Smith versus Wheeler.

Writ of Erroz was brought to reverse a Judgment aiven in the Common Pleas upon a special Aerdict in an Ljectione firme. The Jury found that one Simon Mayne was possest of a Rectory for a long term, and having conveyed the whole term in part of it to certain persons absolutely, he conveped his term in the relidue, being two parts, in this manner; fc. in truft for himself during life, and afterwards in trust for the payment of the Bent referved upon the original Leafe, and for feveral of his friends, &c. Provided, that if be thould have any iffue of his body at the time of his death. then the truffs to cease, and the Assignment to be in trust for fuch issue, ec. and there was another Proviso, that if he were minded to change the uses, or otherwise to dispose of the premiffes, that he should have power to to do by writing in the prefence of two or more Witnesses, or by his last Will and They further find, that he had Mue male at the time of his death, but made no disposition pursuant to his power: and that in his life time he had committed Treason. and they find the Act of his Attainder. The question was, whether the rest of the term that remained unexpired at the time of his death, were forfeited to the King? The points made were two. 1. Whether the Deed were fraudulent? 2. Whether the whole term were not forfeited by reason of the trust, of the power of revocation. Pemberton argued, that the Deed was fraudulent, because he took the profits during his life, and the Affignees knew not of the Deed of truff. The Court bath in these cases adjudged fraud upon circumstances appearing upon Record, without any Aerdick: the case that comes nearest to this is in Lane; 42. &c. The King against the Earl of Nottingham and others. 2dly, he argued, that there was a Trust by express words; and if there be a Trust, then not only the Cruft, but the Effate, is bested in the King by the express words of the Stat. of 33 Hen. 8. The King inbeed can have no larger Effate in the Land, then the person attainted had in the Truft; and if this Conveyance were in Truft for Simon Mayne only during his life, the King can have the Land no longer; but he conceived it was a Trust for Simon Mayne during the whole term. A Truft, he faid, was a right to receive the profits of the Land, and to dispose of the Lands in Equity. Idow if Simon Mayne had a right to receive the profits, and a prefent power to dispose of the Land, he took it to be a Truft for him: and that confequent: ly by his attainder it was forfeited to the King. Coleman contra: As for the matter of Fraud, first there is no Fraud found by the Jury, and for you to judge of Fraud upon Cir. cumstances, is against the Chancellor of Oxfords case, 10th As for the Trust, it must be agreed, that if there be any either Trust or Condition by construction upon these Provisces in Simon Mayne in his life, between Mich. 1646. and the time of making the Act, the Crust will be bested in the King: but whether will it be vested in the King, as a Trust or as an Effate? For I am informed, that it hath been adjudged between the King and Holland, Styles Reports; That if an Alien purchase Copy hold Lands, the King shall not have the Effate, but as a Truft; and the particular reason was, because the King hall not be Tenant to the Lord of the Pannoz. Keeling. The Act of Parliament takes the Effate out of the Crustees, and puts it in the King. Coleman. But I fay here is no Trust forfeitable. By the body of the Died all is out of him. If a man makes a feofiment in fee to the use of his taill, because he bath not put it out of him, there arifes an Ale and a Truft for himfelf. But in our cafe, he hath put the Ales out of himself: for there are several Ales But there is a further difference: if Simon Mayne had declared the Ale to others absolutely, and had referbed if. berty to himself to have altered it by his will, that might have altered the case: But here the Proviso is, That if at the time of his beath he thall have a Son, ec. fo that it is reduced to him upon a Condition and Contingency. As to the power of Revocation, he cited the Duke of Norfolks case in Englefields case; which Twisd. said came strongly to this. Adjourned. V. infr.

Gor Information was exhibited against one for a Libet. Goleman. The party has confessed the matter in Court, and thereis cannot pleas not guilty. Twisd. You may pleas not guilty trith a selicia verificatione.

Home & Ivy.

Refs. for taking away a Ship. The Defeavant fuffities arrose the Parent, whereby the Canary-Company is incorporates and grantes, that none but fuch and fuch foons Crave thither, on pain of forfeiting their Ships and Goods, Se. and lays, that the Defendant old Crade thither, et. the Plaintiff demucs. Polynxfen. De ought to have motor the Deen ishereby he was authoris'd by the Company to leise the SOURS: 26 H. 6.8. 14 Ed. 4.8. Bro. Corp. 59. though 3 agree, that for opinary Implopments and Services, a Copposition may appoint a Dervant without Deev, us a Cook, a Butler, et. Plo. Com. 91. A Copposition cannot Licence a Aranger to let Cras without Deed : 12 H. 4. 17. 1202 can they make a Ometton without Derb, not beliver a Letter of Attorney without Dest. 9 Ed. 4. 59. Bro. Corp. 24. 34. 14 H. 7. 1. 7 H. 7. 9. Rolls 514. tit. Corporation, Dr. Bonhams case. Again, the plea is bouble: for the Defendant alledgeth two causes of a breach of their Charlet, viz. their taking in Mines at the Canaries, and importing them here: w is double. Then, there is a chance that given the forfeiture of Goods and Impelenment, which cannot be by Patent: 8 Rep. 125. Waggeners cafe. Noy 123. in the cafe of Monopolies. This Parent I take alle so be contrary to fome Sas of Mariament, viz. 9 Ed. g. c. 1. 2 Ed. 3. cap. 2. 2 Rich. 2. cap. 1. 11 Rich. 2. cap. 2. and their Gentures the king cannot dispense without by a Non obliante. Twife for the first point, I think they cunnot ferse without Weed, no more then they can enter for a Condition broken without Weed. Keel. tale delite to be latisfied whether this be a 99 on opoly of not. It was ordered to be argued.

Pryn versus Smith.

Scire Facias in this Court, upon a Recognizance by way of Bail upon a Writ of Erroz in the Erchequer Chamber. The Defendant pleaded, that the Plaintiff did after Audgment sue forth a Capias ad satisfaciend, out of this Court to the Sheriff of Middlesex, whereupon he was taken in Execution, and suffered to escape by the Plaintiffs own consent. Jones. The have demurred because they do not say a place where this Court was holden, not where the Plaintiff gave his consent.

Redman & Pyne.

A Adion upon the Case was brought for speaking these words of the Plaintiss, being a Watch-maker, viz. He is a bungler, and knows not how to make a good piece of work: but there was no colloquium last of his Trave. Pemberton. The Jury have supply othat, having found that he is a Watch-maker. And it is true, that words shall be taken in mitiorisfensu: but that is when they are doubtful: Caudry's case: I Cro. 196. Twisden. I remember a Shoe maker brought an Action against a man, for saying that he was a Cobler: And though a Cobler be a Trave of it self, yet held that the Action lay in Glyn's time. Saunders. If he had said that he tould not make a good Watch, it would have been known what he had meant: but the words in our case are indifferent, and perhaps had no relation to his Trave.

Vere & Reyner.

A In action upon the Cale upon a promile to carry duas carectatas, &c. Rotheram. Its uncertain whether carectata fignifies a Porle-load, or a Cart-load. Judgment nis, &c.

Twild. I have known, if a Judgment be given, and there is an agreement between the parties not to take out Execution till next Term, and they do it before, that the Court has let all aftee.

One brought up by Habeas Corpus out of the Cinque-Ports, upon an Information for breaking Prilon, where he was in upon an Execution for Debt. Barrell moved against it. Twild. Suppose a man be arrested in the Cinque-Ports for a matter arising there, and then another hath cause to arrest him here, is there not a way to bring him up by Habeas Corpus? Barrell. It was never done, but there has been a Habeas Corpus thirther ad faciend. & recipiend. Keel. If a man be in Prison in the flext, we bring him up by Habeas Corpus, in case there be a Suit against him here. Twisd. There shall such a man be sued, upon a matter arising out of the Cinque-Ports? Barrell. If it be transitory, he must be sued there; is local, elsewhere. Twisd. Then you grant, is local, that there must be a Habeas Corpus. And so it was allowed in this case.

Two Juffices of Peace made an Diver, in Sellion-time, against one Reignolds, as reputed father, for the keeping of a Bastard-child: Reignolds appealed to the same Sessions, where the Juffices made an Diver that one Burrell should keep it. Jones moved to let alive this Dider, though an Dider of Seffions upon an Appeal from two Juffices; because he sato the first Dider being made in Session time, that Sessions could not be faid to be the next within the Stat. of 18 Eliz. and because the Justices at the Sessions, vio not quash the Diver made by two Juffices. Keel. They ought to have done that. Twifd. They may vacat the first Order, and refer it back to two Juffices as res integra. The Diver being read, one clause of it was, that Burrell should pap 12 d. a week for keeping the Child, till it came to be twelve years of age: which Twisden faid was ill, for it ought to be follong as it continues chargeable to the Parish: The parties were bound over to appear at the nert Affizes in Effex.

Darby-shire versus Cannon.

Sympson moved, that the Defendant having submitted to a Rule of Court for referring the matter, and not performing the Award, an Attachment might be granted against him. Telhich was granted: but when the party comes in upon the Attachment, he may alledge, that the Award is poin; and if it appear to be so, he shall not be bound to perform it.

Buds 1. Jyd: 452: 453: contra.

Owen Hannings.

In a Trial at Bar upon a Scire facias to avoid a Patent of the Office of Searcher, exception was taken to a Witness, that he was to be Deputy to the party that would avoid the Patent. Twifd. If a man promise another, that if he recover his Land, the other shall have a Lease of it, he is no good Witness: so neither is this man. But by the Opinions of the this other Judges he was allowed, because the Suit here is between the king and the Patenter.

Worthy & Liddall.

Aunders moved for a Prohibition to the Spiritual Court, in a Suit there, for calling the Plaintiff Whore. Twifd. Opinions have been pro and con upon this point. The Spiritual Court has a Jurisdiction in cases of Alhoredom and Adultery; but if Suits there were allowed for such railing words, they would have work enough from Billingsate. Saunders relyed upon this, that they were only words of heat. Keel. They are Judges of that. Saunders. In Mich. 11 Jac. Rot. 664. Cryer versus Glover. in Com. B. The suggestion was, that the struck him, and he said, thou art a Albore, and I was never struck by a Albores hand before there a Prohibition was granted, and I conceive the reason was, because there was a provocation; so in our case, it appears;

pears, that they were Scolding. According 15 Jac. Rot. 325. Short versus Cole, & 15 Car. 2. between Loveland & Goose. The Court resuled to grant a Prohibition.

Maddox.

Allop moved for a Prohibition to the Spiritual Court for one Maddox, Incumbent of a Donative within the Diocels of Peterborough, who was cited into the Spiritual Court for marrying there without a Licence; and cited Fairechilds case, Yel. 60. But per Keeling, Moreton & Rainesford, the Prohibition was denied. Twisden doubted; but said, if they might punish him in the Ecclesiassical Court pro reformatione morum, at least they could not deprive him.

Doctor Poordage.

Artue moved for a Writ of Priviledge for him, he being a practing Phylitian in Town, and chosen Constable in a Parist. The Court said, if the Office go by houses, he must make a Beputy. But upon consideration the motion was resuled; and a difference made between an Attorney or Barrister at Law, and a Phylitian: the former enjoy their Priviledge, because of their attendance in publick Courts, and not upon the account of any private business in their Chambers: and a Physitians Calling is a private Calling. Wherefore they would not introduce new Presents.

Sir John Kirle versus Ofgood.

A D Action for words, viz. Sir John Kirle is a forsworn Justice, and not fit to be a Justice of Peace, to sit upon the Bench; and so I will tell him to his face. Doved in arrest of Judgment, because to say a man is forsworn, is not Actionable, so it may be understood of swearing in common

Mite. Jones. Chey are Anonable, because applied to his Mite. Scukely's case. 4 Rep. & Fleetwood's case in Hob. Though a mans Office is not names, yet if the word to refer in themselves, or are applyed to it, they are actionable: to in our case. Winnington. They are not Automable, for they admit of a construction in miciori sensu: in Stukely's case that has been cited, corruption in his Office is necessarily simplyed, but not in this case. Rolls 56. Keeping. He case him in essent a corrupt Justice; and that supplies the communication concerning his Office: words must be construed according to common acceptation. Morton. I see little difference between this and Sir John Isam's case. I Cro. 14. & Sir William Massam's case. Rainsford accorded. He cited I Rolls 53. & 4 Rep. Stukelies case. Twilden was of the same Opinion: so the words tend to disgrace him in his Office. Judgment to the Plaintiff.

Hastings Attorny of the K. B.

Innington complained to the Court on his behalf, that V be being an Attomey of this Court, was not suffered to appear to his Chent in the Court at Stepney. Chat Court, he late, was created by Letters Paterns within thefe tivo years; and the Accountes of this Court, being an arrient Court, ought not to be excluses. On the other five is was ticged, that they had a certain number of Actornies appointed by their Charter, as there is at the Parchals Court. Recling. This is a new Court, and for my part I think our Attomies cannot be excluded. Hastings may being bis action. If a Patent erecting a new Court, may limit a certain number of Attomics that half macife there, it may us well finit a certain number of Countel. Coleman. They have to in the Barthal. Cep, and in London. Keeling. Their Courtein London are an. cient, and their Customs confirmed by Sas of Parliament. The now Court of the Marthalley is invier a new ereded Court, (for the old Court of the Aerge was another thing) and as top their having a certain number of Counter of Attornies, the question is the same with this better as, whether they can legally exclude others. I do not let how the King by a new Patent can ouffe any man of his professe. Twilden fait it

24 Term. Mich. 21 Car. II. 1669. in B. R.

was a new point, and that he had never heard it fir'd before. Afterwards being moved again, Keeling faid, they should have their Judgments quickly, if they stood upon it.

Twisd. I have known this ruled, if you say you will refer the cause to such a man, that ex consequence the cause must stay, because that man is made Judge; and that the staying of the cause is implied in the reference.

Dominus Rex versus Vaws.

Dued to quath a Pzelentment foz refusing to be swozn Constable of an Hundzed, because the Pzelentment does not mention befoze subom the Sessions were held, which was quash'd accozdingly; and Twisden said, the Clerk of the Peace ought to be fined foz returning such a Pzelentment.

Birrell & Shawe.

Scire facias against the Bail. The Defendant pleads, that before the return of the Alrit of Scire facias, there was a Capias ad satisfaciend. against the principal, by vertue whereof he was taken, and paid the money: but alledges no place where the payment was. Twisd. You cannot make good this fault.

Dodwell & Ux. versus Burford.

Defendant flruck the boxle whereon the Wife rode, so that the Poxle ran away with her, whereby she was thrown bown, and another boxle ran over her, whereby she lost the use of two of her Kingers. The Jury had given them 48 l. damages, and they moved the Court upon view of the mathem, to increase them: whereupon the Declaration was read; but the Court thought the damages given by the Jury sufficient.

Smith

Smith versus Bowin.

Ction upon a promise. The Plaintiff Declares, that the Defendant, in consideration that the Plaintiff would fuffer him to take away to much of the Plaintiffs Grafs, which the Defendant had cut down, promifed to pay him fo much for it, and also to pay him six pounds which he owed him for a Debt. After a Clerdia for the Plaintiff, Williams mobed in Arrest of Judgment, that the Plaintist was an Infant, and be not being bound by the agreement, that the Defendant ought not to be bound by it neither. Keeling. It an Infant let you a boule, shall he not have an Action against you for the Rent? Twisd. I have known an Action upon the case brought by an Infant upon a promise to pay so much money, in confideration that he would permit the Defendant to enjoy fuch a boule: it was long infifted upon, that this was not a good confideration, because not recipzocal; for the Infant might avoid his promife, if an Action were grounded upon it against him: but it was adjudged to be a good confideration, and that the Action was maintainable. And in the principal cafe the Court gave Judgment for the Plaintiff, Nis, &c.

Bear versus Bennett.

Twisden. When a man is arrested, and has sain in Prison three Terms, and is discharged upon Common bail, whether shall the Plaintist ever hold the Defendant to special Bail afterward so, the same cause, if he begins anew? Keel. If he may, then may a man be kept in Prison so, ever at that rate. At last it was agreed, that if he would pay the Defendant his Costs so, lying so long in prison, he should have special Bail.

Mr. Masters moved for a Prohibition to the Spiritual Court to stay a Suit there against a man, for having married his Wises Sisters Daughter, alledging the Harriage to be out of the Levitical degrees. Cur. Take a Prohibition and demur to it, for it is a case of moment.

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Dominus

Dominus Rex versus Turnith.

Deed to quash an Indiament upon 5 Eliz. cap. 2. for exercising a Trade in Chesthunt in Hertfordshire, not having been an Apprentice to it so, seven years: because the Statute says, they shall proceed at the Quarter-Sessions, and the word Quarter is not in the Indiament. Twisden. That word ought to be in. And I believe the using of a Trade in a Country Aillage, as this is, is not within the Statute. Morton accorded. Rainessord. It will be very prejudicial to Copporations not to extend the Statute to Aillages. Twisden. I have heard all the Judges say, that they will never extend that Statute surther then they needs must. Obj. further, That there wanted these words, see Ad tune & ibidem onerati & jurati, so, which all the three Judges, Keeling being absent, conceived it ought to be quash'd.

A cause was removed out of London by Habeas Corpus, wherein the Plaintiff had declared against the Defendant as a feme sole Merchant; and Bartue moved for a Procedendo, because (be said) they could not declare against ber here as a seme sole, for that the had a busband. Jones contra. The Husband may then be joyned with her, for he is not beyond Sea. Twifd. I think a Procedendo must be granted for the cause alledged. It was resolved in Langlin & Brewin's case, in Cro. (though not reported by him) that if the Wife use the same Trade that her bus band does, the is not within the Custom. And they are to determine the matter there, whether this case be within their Custom: perhaps a Cliqualler (as this Trade is) is not such a Trade as their Custom will warrant: and whether it will warrant it og not, is in their Judgment. A Procedendo was granted.

Tombin versus Fuller.

Special Action on the Cale was brought for keeping a pallage flope up, to that the Plaintiff could not come to cleanse his Gutter. After Aervia for the Plaintiff, it was moved in Arrest of Judgment, that there ought to have been a tequen for the opening of it. Aniw. Its true, where the Mulance is not by the party himlets, there must be notice befole the Action drought: but in this case, the wrong began in the Defendants own time. Twilden. I know this bath been ruled! where a man made a Leafe of a boule with Aree liberty of ingress, &c. through part of the Letton bonte, the Leffor notwithstanding might thut up his doors, and was not bound to leave them open for his conting in at one of two of the Clock at night, but he must keep good hours. And must the Defendant in this case keep his Gate always open expecting him? whetefore it feems he ought to Cur. Its aided by the Merdia. have laid a request. Twisden. It is not good at the Common Law; and the Defendant might well have demurred for that cause. Judgment pro Querente.

Butler & Play.

Maynard said, the protest must be on the day that the money becomes due. Twisden. It hath been ruled, That is a Bill be denied to be paid, it must be protested in a reasonable time, and thats within a fortnight: but the Debt is not lost by not doing it on the day. A new Trial was denied.

Hughes & Underwood.

Eeling. The very Sealing of the Ultit of Erroz is a Superfedeas to the Execution. Twifd. There was once a Ultit of Erroz to remove the Recozd of a Judgment between such and such: but some of the parties names were left out: and by my Bzother Wyld's advice, that Ultit not removing the Recozd, they took out Execution. But the Court was of Opinion, that, though the Recozd was not removed thereby (of which yet, they said, he was not Judge, whether it was, or not) yet, that it so bound up the cause, that they could not take out Execution. It is indeed good cause to quash the Ultit of Erroz, when it comes up; but Execution cannot be taken out.

Term.

Jefferson & Dawson.

M a Scire facias upon a Recognisance in Chancery entered into by one Garraway, There was a demurrer to part, and issue upon part. And the question was, whether this Court could give Judgment upon the demurrer? Jones. The Judgment upon the demurter muft be given in Chancery. The Court of Chancery cannot try an Isiue, and therefore it is fent hither to be tryed: but with the demurrer this Court has nothing to do. Indeed the books differ in case of an Mue sent hither out of Chancery, whether the Judgment thall be here of there : Keilway faps, it ought to be given here. Dy Low Coke in his 4 Init. fays, it must be given in Chancery. But none ever made it a question, whether Judgment upon a demurrer were to be given here of there? V. Co. Jurisdiction of Courts, fol. 80. Saunders contra. When there is a demurrer upon part, and Isue upon part, the Record being here, this Court ought to give Judgment; because there can be but one Execution. Keeling. If the Recoed come hither entirely, we cannot send it back again: I cannot find one Authority that the Record thall be removed from hence. De cited Keilway 941. 21 H. 7. Co. 2. 12. Co. Entries, 678. 24 Ed. 3. fol. 65. there it is beld, that Judgment thall be given here upon a demurrer. Dow if it must not be given here, there must be two Executions for the same thing, or elfe they must loose half, for they can have but one Elegit. At another day the Judges gave their Opinions feverally, that Judgment ought to be given in this Court upon the whole Record: for that it is an entire Record, and the Execution one; and if Judgment were to be given there upon the demurrer, there must be two Executions. And because the Record hall not be remanded. Twisden said, the Recozd it felf was here: and that it had been so adjudged in King and Holland's case, and in Dawkes & Batter's case: though

2. Junio: 23. m

Accordingly Judgiffelit was grown here.

Willbraham & Snow.

Rover & Conversion. Apon Islae Not-guilty, the Jury find a special Clerdict, viz. that one Talbot recovered in an Action of Debt against one Wimb, and had a Fieri facias directed to the Sheriff of Chefter, whereupon he took the Goods into his polletion, and that being in his polletion, the Defendant took thein away, and converted them, ac. and the fole point was, whether the possession which the Sherist has of Goods by him levied upon an Execution, is fufficient to ena-ble him to bring an Action of Trover? Winnington I conceive the Action boes not He. An Action of Trover and Conversion is an Action in the right, and two things are to be probed in it, viz. a Property in the Plaintiff, and a Conberfion in the Defendant. I confely that in fome cafes, though the Plaintiff have not the absolute property of the Goods. pet as to the Defendants being a wrong voer, he may have a sufficient property to maintain the Action against him. I hold, that in this case the property is not at all altered by the leisure of the Goods upon a Fieri facias, (for that he cited Dyer, 98, 99. & Yelvert. 44.) This case is something like that of Commissioners of Bankeupts : they have power to fell, and grant, and affign: but they cannot bying air Action: their Affignees must bying all Actions. It is true, a Sheriff in this cafe may bying an Action of Trespais, because be has possession: but Trover is grounded upon the right, and there must be a Property in the Plaintist to support that : whereas the Sheriff takes the Goods by vertue of a nude Authority: As when a man deviseth, that his Executors than fell his Land, they have but a nude Authority. Cur. The Sheriff

Theriff may well have an Action of Trover in this cafe. As for the cafe in Yelvert. 44. there the Sheriff feis'o upon a Fieri facias: then his Office Determined: then he fold the Goods, and the Defendant brought Trover. And it was holden, that the Property was in the Defendant, by reason of the betermining of the Speriffs Office: and because a new Fieri facias must be taken out, for that a venditioni exponas cannot issue to the new Sheriff. They compared this case to that of a Carryer; who is accountable for the Goods that he receives, and map have Trover of Trespass at his Election. faid, the Commissioners of Bankrupts might have an Action of Trover, if they did actually feize any Goods of the Bankrupts, as they might by Law. Rainsford fait, let the 1920perty, after the feizure of Goods upon an Execution, remain in the Defendant, or be transferred to the Plaintiff, fince the Sheriff is answerable for them, and comes to the possession of them by the Law, it is reasonable that he should have as ample remedy to recover damages for the taking of them from him, as a Carryer has, that comes to the possession of Soods by the delivery of the party. Morton said, if Goods are taken into the custody of a Sherist, and the Defendant afterward become Bankrupt, the Statute of Bankrupts hall not reach them: which proves the Property not to be in the Defendant. Twifd. I know it hath been urged several times at the Asizes, that a Sherist ought to have Trespass, and not Trover, and Counted have pressed hard for a special Clerost. Morton, My Lord Chief Justice Brampston said, he would never veny a special Aerdia while he lived, if Countel Did belire it.

Gavell & Perked.

A Ction for words, viz. You are a Pimp and a Bawd, and fetch young Gentlewomen to young Gentlemen. Upon Mue Not-guilty, there was a special Acrdit found. Jones. The Declaration says surther, whereby her housband did conceive an evil Opinion of her, and resuled to cohabit with her. But the Jury not having found any such special damage, the question is, whether the words in themselves are Actionable, without any relation had to the damage alledged. I confess, that

that to call one Bawd is not Actionable: for that is a term of remoach used in Scolding, and does not imply any act, whereof the Tempozal Courts take notice: for one may be faid to be a Bawd to her felf. But where one is faid to be a Bawb in fuch actions as thefe, it is actionable: 27 H. 8. 14. If one lay, that another holds Bawdy, it is Actionable : I Cro. 329. Thou keepest a Whore in thy House to pull out my Throat: thefe words have been adjudged to be Actionable: for that they ervress an act done; and so are special and not ceneral railing words. In Dimock's case 1 Cro. 393. Two Juffices were of Opinion, that the word Pimp was Actionable of But I do not relie upon that, or the word Bawd; but taking the words all together, they explain one another: the. latter words flow the meaning of the former; viz. that her Dimping and Bawdy confisted in bringing young men and women together, and what the brought them together for, is fufficiently expressed in the words Pimp and Bawd; viz. that the brought them together to be naught. And that is such a Slander, as if it be true, the may be indicted for it, and is punishable at the Common Law. The Court was of the fame Opinion: and gave Judgment foz the Plaintiff. Nifi, &c.

Healy & Warde.

Europ of a Judgment in Hull. Weston. The Action is brought upon a promise, cum inde requisitus foret: and does not say, cum inde requisitus foret infra Jurisdictionem. Twisd. Though the agreement be general, cum inde requisitus foret, yet if he does request within the Jurisdiction, it is good enough; and so it has been ruled: and this Error was disallowed.

Boswill & Coats.

zolo feveral Lenacies are given by zzill to Alice Coats and John Coats; the Executors Deposit these Legacies in a third persons hand for them: and take a Bond of that third person, conditioned, That if the Obligor at the request of shall bring in Alice and John Coats, when they shall come to their Ages of Twenty one years, to give such a Release to the Executors of Francis Gibbs as they shall require, then, &c. one of the Legatees comes of age, and during the minozity of the other, the Bond is put in Suit; and this whole matter is disclosed in the Pleading . And the question was, whether the Defendant was obliged to bying him in, to give a Releafe, that was of Age before the Action brought, or might stay till both were of Age, before he procured a Release from either? The Court was of Opinion, that it must be taken respecifiely, and because it appears, that the Legacies were several, that several Releases ought to be given, upon the reason of Juffice Wyndham's case, 5th Report. And Twisden said, if there were no more in it, then this, ic. when they shall come to their Ages of, &c. it were enough to have the Condition understood respectively: for they cannot come to their Ages at one and the same time. And Judgment was given accoldingly.

Twisden. If an Erecutor plead several Judgments, you may reply to every one of them, obtent. per fraudem; or you may plead separalia Judicia, &c. obtent. per fraudem; but in pleading separalia Judicia obtent. per fraudem, if one be sound to be a true debt, you are gone.

Keeling & Twisden. Notwithstanding the Stat. of 23 H. 6. which obliges the Sherist to take Bail, yet he can make no other Return of a Capias, then either cepi corpus, or non est inventus: for at the Common Law he could return nothing else, and the Statute, though it compels him to take Bail, does not alter the Return: and so in a case between Franklin & Andrews, it has been adjudged here.

Crofton.

Ffley moved for a Certiorari to the Juffices of Peace for Middlesex, to remove an Indiament against one Crofton upon the late Statute made against Non conformilt Ministers, coming within five miles of a Copposation: the Indiament was traversed. He urged, that by the Statute, no Indiament will lie for such Offence: For where an Act of Parliament enace, that the Penalty shall be recovered by Bill, Plaint, or Information, (as the Statute upon which this Indiament is grounded, does) there an Indiament will not Twifd. If the Statute appoint that the lie: 2 Cro. 643. penalty thall be recovered by Bill, Plaint, ec. and not otherwife, there (I confess) an Indiament will not lie: but without negative words I conceive it will, though the Statute be Introductive of a new Law, and create an Offence, which was none at the Common Law. For whenever a thing is prohihited by a Statute, if it be a publick concern, an Indiament lies upon it: and the giving other remedies, as by Bill, Plaint, &c. in affirmative words, thall not take away the general way of proceeding which the Law appoints for all Defences. Keeling differed in Opinion, and thought, that where a Statute created a new Offence, and appointed other remes dies, there could be no proceeding by way of Indiament. Afterward Offley moved it again, and cited 2 Cro. 643. 3 Cro. 544. Mag. Chart. 201. & 228. Apon the second motion. Keeling came over to Twisden's Opinion. But it was objected, That upon an Indiament the Pool of the Parish would lose their part of the penalty: to which Twisden said, that he knew it to have been adjudged otherwise at Serjeants-Inn, and that where a Statute appoints the Penalty to be divided into the parts, one to the Informer, another to the King, and the third to the Poor; that in such case, where there is no Informer, as upon an Indiament, there the King hall have two parts, and the 19002 a third.

The King versus Baker.

A R Indiament in Hull for laying these words, viz. That whenever a Burges of Hull comes to put on his Gown, Sathan enters into him. Levings moved, that these words would not beat an Indiament. Keeling. The words are a Scandal to Government. Levings. The Indiament concludes, in malum exemplum inhabitantium, whereas it should be, q uamplurimorum subditorum Domini Regis in tali casu delinquentium. And sor this adjudged naught.

Twisden. It the Defendant in an Action of Debt for Rent plead nil debet, he may give in Evidence a suspension of the Rent.

A Parson Libels in the Spiritual Court against several of his Parsibioners for Tythe-Turfe. They pray a Prohibition. Keeling. Turfe, Gravel and Chalke, are part of the Free-hold, and not Tythable. They granted one Prohibition to all the Libels, but opered the Plaintists to beclare severally.

Maleverer versus Redshaw.

pearing at a certain day, and concluded, if the party appeared, then the Condition to be void. The Defendant pleaded the Statute of 23 H.6. Coleman. The Bond is void by the expects words of the Statute, being taken in other form then the Statute pectities. Keeling. If the Condition of a Bond be, That if the Obligor pay so much money, then the Condition to be void, in that case the Bond is absolute. Twisden. I have heard my Lord Hobart say upon this occasion, that because the Statute would make sure work, and not leave it to Exposition what Bonds should be taken, therefore it was added, that Bonds taken in any other form should be void. For, said he, the Statute is like a Cyrant, where he comes, he makes all void: but the Common Law is like

a Mursing Father, makes void only that part where the fault is, and preserves the rest. Keeling. If the Condition had been, that the party should appear, and had gone no surther, it would then have been well enough. Twisd. Then why may not that which follows be rejected, as idle, and surplusage? Cur. Advisare vult.

Jones versus Tresilian.

A Ration of Trespass of Assault and Battery. Defendent pleads, de son assault demesse. The Plaintist replies, That the Defendant would have forced his bosse from him, whereby he did molliter insultum facere upon the Defendant, in defence of his possession. To this the Defendant demurred. Morton. Molliter insultum facere is a contradiction. Suppose you had said, that molliter you struck him down. Twisden. You cannot justifie the beating of a man in defence of your possession, but you may say that you did molliter manus imponere, &c. Keeling. You ought to have replyed, that you did molliter manus imponere, quæ est eadem transgressio. Cur. Quer' nil capiat per billam, unless better cause be shown this Term.

Rich & Morris.

In an Action of Debt for not performing an Award. The Plaintiff veclares, that inter alia Arbitratum fuit, &c. Twifd. That is naught.

---- & Crifp versus the Mayor of Berwick.

A M Action of Covenant is brought against the Mayor, Burgesses and Corporation of Berwick, upon an Indenture of Demile; wherein the Plaintiss declare, that the Defendants did demile to them a Poule in Berwick, with a Covevant, That the Plaintiss should enjoy the same without intercuption

terruption by them, or any other person or persons whatsaever: and alledge, that a Stranger claiming a Title, did make an Entry upon them, and kept them out of poffession. To this the Defendants plead a local Plea: to wit, that the faid Stranger Did not enter upon the Plaintiffs, ec. upon which Iffue is joyned. Then do the Plaintiffs make a luggestion, and pay a Venire facias into the next County. Upon which there is a Trial. Jones conceived this to be a mil-trial, and that the Venire ought to have been de vicineto of the Cattle of York, where the Covenant is alledged to have been made: First, this fault is not aided by any of the Statutes of Jeoffayles: not by the last and greatest of all. where the Venire facias is awarded from another place then it ought to be, but not when awarded from another County; which is my Exception. That at the Common Law this Venire facias is not well awarded, I relie upon Dowdale's case 6 Rep. if an Action be brought upon a matter done out of the Kingdom, the Trial chall be where the Action is laid. In our case the Action is grounded upon an Indenture, supposed to be made within the County of York : but Mue is joyned upon a matter done out of the Kingdom; for so Berwick is. This Islue, I conceive, ought to be tryed where the Action is laid. It is true in the case of Wales, the Law is other= wife: for I find, that Wales is parcel of the Realm of England, though the Kings Wirits do not run there. But Berwick is part of the Realm of Scotland, and was conquered by King Edw. 4. and Ads of Parliament name Berwick. When Calice was in possession of the Kings of England, and a matter ariting within Calice came in Iffue, was ever any Venire facias awarded to Dover? Twifd. There are two 1920= fidents of such Trials: one in 12 Eliz. Rot. 630. and in 2 Rolls 97. I have asked my Brother Withrington, who was a knowing man, how it came to pass that Berwick was put into Acts of Parliament? he faid, he knew no other reason then that the Recorder of Berwick was at first in Parliament. and defired it, and therefore it bath continued ever fince. Mr. Weston sasty that 3 Cro. 465. was an Authority. In this case it hapned, that during the Cur. advisare vult, one of the Plaintiffs dyed: and the question was, what should be done? Twifd. There is a case in Latch, wherein this difference is taken, viz. If there be no Continuance entred, you may enter the Judgment as at the day in Bank: but if Continuances are entred, then you cannot go back, but must enter the Judge ment to the time of the Continuances. It was put off for conniel to be heard in it.

Smith & Wheeler Sup. 16.

12 this cale Serjeant Maynard was about to argue, that the residue of the term was not forfeited to the King. Keel. Brother Maynard, you would be well to be advised, whether of no you, being of the Kings Counfel, ought to argue in this case against the King? Maynard answered, that the Kinas Counsel would have but little to do, if they should be excluded in such cases: and that Gerseant Crew argued Haviland's case, in which there was the like question. In Stone & Newman's cafe, I know the Kings Countel Did argue against Estates coming to the Crown: but if my Low thinks it not proper, my Brother Maynard may give his argument to some Gentleman at the Bar to beliver for him. Afterward Term. Pasch. 22 Car. 2. 1670. the case came to be argued again. Jones argued for the Plaintiff in the Writ of Erroz: 1. Whether this Dettlement be fraudulent og no? that Frand is not to be presumed, he cited the Chancellor of Oxford's case, 10th Rep. & 1 Cro. 549, 550. But for the second point, he held that here is a Truft forfeitable to the King. De quoted Sir John Duncomb's case: 2 Cro. That the Truft in this case is forfeited, he proved from the nature of a Trust, which is an equitable Interest, or a right of perception of the profits of an Effate: the cestuy que Trust, hath jus habendi & jus disponendi. And though he that bath a Trust, hath in Law neither jus in re, noz jus ad rem, pet in Equity he hath both: In Equity whatever I have a right to dispose of, I have a right to take the profits of. For if a man makes a Conveyance to the use of one and his heirs, in Trust that he shall convey over, though it is not expest that he shall take the profits, pet he thall take them. Row in the fecond Proviso there is a double expection, one that amounts to a Revocation, the other amounting to a disposition of limitation. Now he that hath a power of disposition, hath a right that may be forfeited. And therefore the Duke of Norfolk's case comes not to this, for we are not in the power of Reboca-

tion: I becline that, but we are in a power of disposition. Now this is good by way of Trust: in Law indeed such a Proviso is naught, but in a Trust the intention of the parties carries it. I observe in forfeitures at the Common Law, where a man bath only jus disponendi, though he bath no Effate, yet he may forfeit it: Plo. Com. 260. A man is polfest of a term in the right of his wife, though he hath no Estate himself, pet he may forfeit it : and the reason is, because he hath jus disponendi. If a man might by such a dispolition as this protect his Effate from being forfeited, little Land would come to the Crown upon Attainders. are two badges of Ownership: the one is a perception of the profits, the other a power of disposing: both which are in our case: and a favourable construction ought not to be put upon a Det for encouragement of Traitors. Winnington contra. As for the first point, the Frand ought to be found: and this Leafe was made long before the Attainder, or the Treason committed. For the fecond point, the question will be, what our Law calls a Truff? Then I shall examine whether there was such a thing in Mayn at the time of his decease? A Trust I find to be a confidence reposed in the person, that another Hall take the profits, and that the Trustee shall Convey according to his directions : this I gather from thefe books, viz. Plowd. 352. Delamere's case. 1 Rep. 121, 122. Co. Lit. 272. Now if these two qualities, oz either, shall fail in this case, then Simon Mayn had no Trust to forfeit: for that, the case will depend upon the true-stating the words of the Deed. For the first Proviso, it both not cohere with any of these qualities: for by vertue of that Proviso he could not be said to have any Right: he hath no jus disponendi, but upon Contingencies. If he have no Children, he hath no fuch power; nay, if he have Children, they must be living at Further, by these Provisoes, if the Contingencies do happen, he hath but a power to declare the Ales; he hath no Interest in him at all: Litt. Sect. 463. It is one thing to have a power of possibility of limiting an Interest, another to have an Interest vested: 7 Rep. 11. & Moor's Reports 366, about the delivery of a Ring; where thap hold. that if it had been to have been done with his ownhand, it had not been forfeited. The case of Sir Edward Clere is Different from ours: for if a man make a feofiment to the use of his last Mill, or to the use of such persons as shall be appointed by his

last Mill; in this case he remains a perfect owner of the Land. But if a man makes a Conveyance with power to make Leafes, of to make an Effate to pay Debts, he hath here no Interest, but a naked power. The Duke of Norfolk's case is full in the point: A Conveyance to the use of himself for life, the Remainder to his Son in Tail, with power to revoke under hand and Seal: adjudged not fogfeited: and pet he had a power to declare his mind, as in our cafe. Pagett's case, Moor 193, 194. Keeling. If this way be taken, a man may commit Treason pretty cheaply. Twisden. Whoever hath a power of Revocation, bath a power of Limitation. The reason is, because else the feoffers would be leized to their own Afe. Sir William Shelly's case in Latch. Twisden. There is no difference tetwirt the Duke of Norfolk's case and this; only here it is under his hand writing, and there under his proper hand writing.

Afterward Term. Pasch. 23 Car. 2. 1671. the Court delivered their Opinions (Hales being then Chief Juffice.) Morton. I conceive the Judgment in the Common-Pleas is well given: As for the first point, whether this Conveyance made by Sir Simon Mayn be fraudulent og not, the Countel themselves have declined it; and therefore I shall say nothing to it: for the fecond, I conceive no larger Interest is for feited then during the Life of the Father. If it be objected, that the Father had by this Provito jus disponendi; I answer. it is true, he had a power, if he had been minded to to do, but it was not his mind and Will: Dow animus hominis est ipse homo; but he muft not only be minded to to do, but he must declare his pleasure. Hobart faith, if a man will create a power to himself, and impose a Condition of Qualification for the Execution of it, it must be observed. here is a personal and individual power, seated in the heart of a man. And it feems to me a stronger case then that of the Duke of Norfolk, put in Englefield's case, where pet the Condition was not given to the King by the Statute of Hen.8. There was a later case adjudged in Latch, between Warner and Hynde: a case that walked through all the Courts in Westminster-hall: there by reason of the ipso declarante, it could not be fogfeited. Rainsford. I hold it is not fogfeited. My reason is, because the Proviso is at an end and determin. ed; for when he dred and made no Will, there's an end of the

Proviso. The altering of the old Trust is to be done by Sir Simon Mayn, and it is inseparable from his person: nothing can be more inseparable then a mans Will. Moor 193. Twisd. I am of the same Opinion. Hales was of the same Opinion: that nothing was forseted but during Sir Simon's life. The Proviso, he said, did not create a Trust, but potestatem disponendi, which is not a Trust. He said he did not understand the difference between the Duke of Norfolk's case and this. Accordingly the Judgment was assirm'd.

In a cause wherein one Aston was Attorney, Keeling said, That a man may discontinue his action here before an Action brought in the Common-Pleas: But if he do begin there, and then they plead another Action depending here, and then they discontinue, I take it the Attorney ought to be committed for this practice. Twisden. Then I was at the Bat, Error was brought, and Infancy assigned, when the Han was thirty years old: and the Attorney was threatned to be turned out of the Roll.

Serjeant Newdigate moved for a Certiorari to remove an Indiament hither from Bedford, against several Frenchmen for Robbery. Keeling. Will it remove the Retognisances there to appear? Twisden. I never knew such a motion made by any but the king's Attorney or Solicitor. Rainsford. There is no Indiament yet before a Judge of Assecting. You may have a Certiorari; but it must not be delibered till the Indiament be found; and then the Judge hath the Prosecutors there, and may bind them over hither, and so the Crial may be here.

Keel. A Jury was never ordered to a view before their appearance, unless in an Affile. Twifd. Reither thall you have it here but by confent.

Nosworthy versus Wyldeman.

The Plaintiff declares in an Indeb. Assumption, that the Defendant was endebted to him in 50 l. for so much morney received of the Plaintiff by one Thomas Buckner, by the appointment and to the use of the Defendant. After a Aeridic for the Plaintiff, it was moved in Acrest of Judgment, that the Plaintiff could not have an Action for money received by the Defendant to the use of the Defendant. But because it might be money lent, which the Defendant received to his own use, though he was to make good the value to the Plaintiff, the Court will presume after a Aerdick, that it appeared so to the Jury at the Trial. For where a Declaration will bear two constructions, and one will make it good, and the other bad, the Court after a Aerdick will take it in the better sense. And accordingly the Plaintiff had Judgment.

Willams versus Lee.

A A Action of Account. It was prayed that the Court would give further day for giving the Account; the matter being referred to Auditors. Twisden. The Auditors themselves must give further day. Keeling. The Auditors are Judges whether there be a voluntary velay or not. If they find the parties remis and negligent, they must certifie to the Court, that they will not account.

Roberts & Mariott.

Died to discontinue an Action of Debt upon a Bond. Keeling. The will not favour Conditions. Ruled, that the other side should shew cause why they should not discontinue.

Buckly versus Turner.

Otion upon the case upon a Promise. The case was, that Edward Turner Bother to the Defendant, was endebted to the Plaintiff for a Quarters. Rent, and the Defendant, in confideration that the Plaintiff mitteret profequi prædictum Edwardum Turner, (so the words are in the Declaration) promifed to pay the money. After a Aerdict for the Plaintiff, it was moved in Arreft of Judgment, that here is not any confideration : for there is no loss to the Plaintiff in fending to profecute, ec. nor any benefit, but a disadvantage to the party that owed the money: belides, there is an uncertainty whither, or to whom he should send. Twisd. Mittere prosequi is well enough: for the Plaintist must be at charge in it. Keeling. Certainly it ought to have been omitteret; and if it be so in the Office-book, we will mend it. This being after a Aeroic, if you mend it, they must have a new Trial; for then it becomes another promise. Jones moved for Judgment, and said, he found the word mitto did fignifie to lend, fozbear, cease og let alone; as mitte me quæfo: I pray let me alone, in Terence. And in the Latine and English Dictionary it hath the sense of forbearing. Keeling. I think the consideration not good, unless the word mitto will admit of that fense. If it have a propriety of sense to signifie forbear, in reference to things as well as persons, it will be well. Whereupon the Dictionary being brought, it was found to bear that fenfe. and Twisden sato, if a word will bear ofvers senses, the best ought to be taken after a Aervict. Court. Let the Plaintiff take his Judgment.

Richards & Hodges.

The Tet upon a Bond. The Condition was to fave a Parish harmless from the charge of a Bassard-child. The Defendant pleaded Non damnificatus. The Plaintist teplies, that the Parish laid out three shillings for keeping the Child. The Defendant rejoyns, that he tended the money 3 and the Plaintist paid it de injuria sua propria. Thereupon

it was demurred: the question being, whether this re-joynder were a departure of no from the Bar? Saunders. It is a good Rejoynder: for in our Bar we fay, that the Parish is not damnified: that is, not damnified within the intent of the Condition. If I am to lave a man harmless, and he will voluntarily run himself into trouble, the Condition of my Bond is not broken. And so our Rejoynder is pursuant to our Bar, and shows that there is no such damnification as can charge us. Twisden. The Rejoynder is a departure; as in an Action of Covenant for payment of Rent, if the Defendant pleads performance; and the Plaintiff reply, that the Rent is unpaid; for the Defendant to rejoyn, that it was never demanded, is a departure. Pou fould have pleaded thus, viz. that non fuit damnificat. till fuch a time : and that then you offered to take care of the Child, and tended, ec. Audament for the Plaintiff, Nifi, &c.

Smith, Lluellyn, & al. Commission. of Sewers.

They were brought into Court by Attachment, because they proceeded to fine a person after a Certiorari delivered. Twisd. Six Anthony Mildmay was a Commissioner of Sewers, and for not obeying a Certiorari, was Indiced of a Præmunire, and was fain to get the kings pardon. And I have known, that upon an unmannerly receit of a Prohibition, they have been bound to the good Behaviour. Keeling. When there are Informations exhibited against you, and you are fined a 1000 l. a man, which is less then it was in King Edward the Chird's time, (for then a 1000 l. was a great deal more then it is now) you will find what it is to disobey the Kings Witt.

Afterwards they appeared again, and Coleman said, the first White was only to remove Presentments; the second to remove Orders; and we have made two Returns, the one of Presentments, the other of Orders: A general Write might have had a general Return. Keeling. Before you sile the Return, let a clause of the Statute of 13 Eliz. cap. 9. be read; which being done, he said, that by the Statute of 23 Henr.

Henr. 8. no Divers of the Commissioners of Sewers are binding without the Royal Affent; now this Statute makes them binding without it, and enacts, that they shall not be Reverst but by other Commissioners. Pet it never was boubted, but that this Court might quession the Lenality of their Owers notwithstanding. And you cannot oust the Jurisdiction of this Court, without particular words in Acts of Parliament. There is no Jurisdiction that is uncontroulable by this Court. Six Henry Hungate's case was a famous case, and we know what was done in it. Morton. Since the making this Statute of Eliz. were those cases in my Lord Coke's Reports adjudged, concerning Chefter Mills. If Commissioners exceed their Jurisdiction, where are such matters to be reformed but in this Court? If any Court in England of an inferiour Jurisdiction exceed their bounds, we can grant a Prohibition. Twild. I have known it ruled in 23 Car. 1. That the Statute of 13 Eliz. cap. 9. where it is faid, there thall be no Supersedeas, &c. hath no reference to this Court, but only to the Chancery. But this is a Certiorari, whereby the King both command the Cause to be removed, & voluit, that it be determined here, and no where elfe. So the Court fined them for not obeying two Certioraries, but fining them that brought them 5 l. a piece:

Jones moved, Chat one who was Partner with his Byother a Bankrupt, being Arrested, might be opdered to put in Bail for the Bankrupt as well as for himself. Twisden. If there are two Partners, and one breaks, you shall not charge the other with the whole, because it is ex malesicio: but if there are two Partners, and one of them dye, the Survivor shall be charged for the whole. In this case you have admitted him no Partner by Swearing him before the Commissioners of Bankrupts. So not granted.

Rawlin's Cafe.

Dved by Sergeant Scroggs, That Rawlins having perfonated one Spicer in acknowledging a Judgment, that therefore the Judgment might be set aside. Twisden. The Statute that makes it felony, does not provide that the Judgment shall be vacated. One Tymberly escaped with his life very narrowly: for he had personated another in giving Bail: but the Bail was not filed. Then he moved, that the Desendant had paid the Kies of the Execution, which the Plaintist ought to have done. So the Court granted an Attachment against the Bayliss.

Taylor & Wells.

Rover & Conversion, decem parium tegularum & valorum, Anglice of ten pair of Curtains and Clalons. Obj. That it is not certain what is meant by a pair, whether fo many two's, og to many Sets: and that in Web & Washburn's case, 1652. four pair of Hangings held not good. Twisden. I remember that a pair of Pangings has been held Trover & Convers. pro decem Ovibus & Agnis, not expressing how many Ewes and how many Lambs, ruled naught. Another action of Trover de velis, not saying how many, held to be naught. It was urged, that ten pair of Curtains and Claions is certain enough: for by pair thall be understood two, and so there are Twenty in all. If it be objected, that it does not appear how many of each, I answer the words, ten pair, hall go to both. Belides, it is after a Aerdia, and therefore ought to be made good, if by any reafonable construction it may. If it had been ten Sets, or ten Suits, then without question it had ben well enough: now why may not a pair be understood of Sets or Suits, or fo many as will ferve for a bed, if it thall not be taken for a couple? They quoted some cases in which it had been adjudged, that in Trover and Conversion for several things, though it did not appear how many of each fort there were, pet it had been held good. Twisden acknowledged that there had

had been such Resolutions, but said, he knew not what to think of such cases, considering the uncertainty of the Declarations. And the word pair in our case, is as uncertain as may be, there a pair of Globes, a pair of Cards, a pair of Congs. The word applyed to some things, signifies more, to others less, and what shall it signifie here? but by three Judges against Twisden, the Plaintist had Ladgment.

Fox & alii Exec' of Pinsent versus Tremain.

De Plaintiffs being Erecutors, and fome of them under age, all appeared by Attomey: and thereupon it was prayed, that Judgment might be flaged; for, 1. An Infant cannot make a Marrant of Attorney. 2. An Infant appearing by Attorney, may be amerced pro falso clamore: and the reason is, because it does not appear that he is under age ; but if he appear by guardian of prochein amy, he shall not be amerced. 3. The Infant may be much prejudiced. For thefe reasons, and because, they said, the practice had gone accordingly, Judgment was stayed. The cases cited pro & con were, 3 Cro.424. 2 Cro. 441. 1 Roll 288. Hutton & Askew's cafe, A Scire facias brought by two Erecutors, reciting, that there was a third, but within age: refolved that all must joyn. Colt & Sherwood's case : tesolved, that an Infant Executor cannot befend by Attorney. Twisden. Where there are feberal Executors, and one or more under age, and the reft of full ace, all muft joyn in an Action, and Administration durante minore ætate, cannot be granted, if any of them be of full ane: Vid. infr.

Haspurt & Wills.

A Special Action brought upon the Custom of Wharfage and Cranage in the City of Norwich: The Declaration sets south, that they have a common Mharfe, and a Crane to it; and then they set south a Custom, that all Goods brought down the River, and passing by, shall pay such a Duty. Obj. That the Custom is not good, sor that it is

Toll-thorough; which is malum Tolnetum. Twisd. There is a case in Hob. 175. of a bad Custom of paying the Charges of a kuneral, though the Plaintist were a Stranger, and not buried in the Parish. So here, if they had unladed at the Key, they should have pass the whole Duty: nay, if they had unladed at any other place in the City, there would have been some reason so it: of if the Declaration had set south, that they had cleansed the River. At Gravesend they claimed a Toll of Boats lying in the River of Thames; and it was adjudged in Parliament to be malum Tolnetum. To stay.

Heskett & Lee.

Writ of Erroz was brought to reverle a Judgment gfven in a common Recovery in the County Palatine of Lancaster. Weston. The Tenant in the common Recovery is an Infant, and appears by his Guardian: but there is a fault in the admittance, for whereas he ought to have been admitted as Defendant, in this form; scil. A. B. admittitur per C. D. Gardianum suum ad comparendum & defendendum: he is admitted in the Record ad fequendum. The fecond Error is in the appearance: which is entred in this manner; fc. qui admissus est ad sequendum, &c. (following the Erroz of the admittance) ut Gardianus ipsius Thomæ in propria persona sua venit & defendit, &c. so that he is admitted ad sequendum, which is the act of the Plaintiff. And as Guardian he befends; which is the act of the Defendant: and further, it is faid that the Guardian appears in propria persona, which cannot be. Dow I conceive that the Affignment of the Guardian, and the appearance of the Suardian, is triable by the Record: and if the Infant thould bying an Action against his Guardian, he must declare that he was admitted to appear and defend his right. Row whether will this admittance ad sequendum, warrant such a Declaration? I conceive it will not, and that therefore the Recovery is erroneous. Winnington. I am for them that claim under the Recovery. And I conceive this whole Record is not only good in substance, but according to the form used in all common Recoveries. If an Infant Tenant appear per Gardianum, either as Defendant of Clouchet, he shall be bound, as well as one of full age.

And if the Guardian faint-pleads or mispleads, the Infant hath an Action against him: 9 Ed. 4. 34, 35. Dyer 104. b. In our case there is a common Recovery, wherein the Tenant is an Infant, who ought to appear by his Guardian : whether the admittance of him here by his Guardian, be well entred or no, is the question : the word sequi signifies only to follow the cause; and the Defendant both prosecute and act; a Venire by Proviso may be taken out at the Defendants Suit: 35 H. 8. 7. fo in a Replevin the Defendant is the profecutor: and the Tenant both fue in common Recoveries, and is the only person that both prosecute and act; so that I think the word is proper. It is true, one book is cited, where prosequendum is void in an Ejectment: 2 Cro.640. 641. Sympson's case, but that Judgment is upon the point of prochein amy. There is a President for me in 6 Car. 1. which I believe, was the president of this case. And Sir Francis Englefield's case, where the Infant came in as Clouchet, is the fame with ours. As for the fecond Error affigned, viz. that the Guardian is faid to come in propria persona; In the Earl of Newport's Case and in Englefield's Case propria persona is in the same manner as here. Row the Law doth not regard so much the manner of the admittance, as that a good Guardian be admitted. Twisden. This is a Recovery suffered upon a Privy Seal from the King, and upon a marriage fettlement, upon good consideration; and therefore ought to be favoured. The word sequatur is as proper for the Defen-Dant as for the Plaintiff. And for the fecond, the words propria persona are well enough, being applyed to the Suardian. who does in proper person appear for the Infant. For an Infant to luffer a common Recovery, if it were res integra, it would hardly be admitted. But if an Infant will re-berfe a common Recovery, he ought to do it whilest he is under age, as it was adjudged here about two years ago, according to my Lord Coke's Opinion. Weston. If you stand upon that, whether an Infant having suffered a common Recovery, may reverse it after he is come of full age, I defire to be heard to it. Cur. advisare vult.

Tildell & Walter.

A Clicar Libelled in the Spiritual Court for Tyth-wood. Barrell prayed a Prohibition, suggesting, that time out of mind they paid no small Tythe to the Clicar, but that small Tythes, by the Custom of the Parish, were paid to the Parison. Twisden. If the Endowment of the Cicarage be loss, small Tythes must be paid according to prescription.

Jordan versus Fawcett.

Erroz of a Judgment in the Common Pleas. An Action was brought against an Executor, who pleaded several Judgments, but soft the last Judgment that he pleads, he both not express where it was entred, not when obtained. Coleman held it well enough upon a general demurrer. Twisden. It is not good, soft by this plea he is tyed up to plead nothing, but nul tiel record. He might, if the Judgment had been pleaded as it ought to have been, have pleaded perhaps obtent. per fraudem. And Judgment was given accoppingly.

Love versus Wyndham & Wyndham.

Thom an issue out of Chancery, the Jury sind a special Aerdia, viz. That one Gilbert Thirle was seized of the Lands in question so three lives, and viv demise the same to Nicholas Love the Father, if he should so long live; that he being so possessed, made his Will, and devised them in this manner; viz. to his Wife for her life, and after her decease to Nicholas his Son so his life, and is Nicholas his Son should dre without Jslue of his body begotten, then he deviceth them to Barnaby the Plaintiss. Then they find that the Wife was Erecutrix, and that she did agree to this Devise. And whether this be a good Limitation to Barnaby of not, is the question. Jones. I conceive it is a good Limitation to Barnaby.

Barnaby. I shall enquire whether a Termoz having bevised to one for life, and after his death to another for life, may go any further: And fecondly, admitting that he may go further, whether the Limitation in our case, which is to begin after the death of the second, without Issue of his body, be good or no? For the first point, he said the reason given in Plo. Com. 519. & in 8. Co. 94. why an Executory Devile of a term is good in Law, is because the Law takes it as debifed to the last man first, and then afterwards to the first man; without which transposition it is not good: for if it fould be a Devile to the first man first, there would be no: thing left for the last but a possibility, which is not grantable Now then, if a man may devile a term after the death of another, then he may device it after the death of two It is true, this cannot be in Grants, for they are founded upon Contracts, and there must be a certainty in them: according to the Rector of Chedington's case. if a Devile may be good after the death of one or two, it is all one if it be limited after the death of five or fir. that a contingency may be devised upon a Contingency, I take it, that the Authorities are clear: 14 Car. 1. Cotton & Herle: 1 Roll 612. resulved by three Juffices. Et Hill. 9 Jac. Rot. 889. 2 Cr. 461. And for the case of Child and Bayly, reported in 2 Cro. 459. and in Roll 613. I conceive it is not against our case; for they held the Devise to be void, not because it was a Contingency upon a Contingency, but in respect of the remoteness of the possibility, and because the term was wholly devised to a man and his Assigns. So that by the express Authority of the two first cases, and by the intplication of this case, I bo think that a Devise to a man after fuch a manner is good, provided that it do not introduce a perpetuity: so that where there is not the inconventence of a perpetuity, though there are many Contingencies. they are no impediment to the Devile. Therefore where a Device is upon a Contingency that may happen upon the expiration of one of more mens lives, and where it is upon a Contingency that may endure for ever, there is a great difference. The reason of the Rector of Chedington's case was, because of the uncertainty; for in case of a grant of a term, there is a great uncertainty; but ours is in case of a Devise; which is not taken in the Law by way of remainder: 12 Aff 5. so that I conceive a Contingency may be limited

upon a Contingency, provided that it be not remote. The fecond point is, whether this Devile (thus limited) be a good Devile? Row I conceive the limitation is as good, as if it had been to his Wife for her life, and after her beath to Nicholas for life, and after his death to Barnaby. I agree, that if these words (if Nicholas bye without heirs of his body) shall not be applied to the time of his death, it will be a void Devile. But the meaning is, That if at the time of his death he shall have no Isue, then, ec. Dow that they must have such construction, I prove from the words of the Will. The limitation of the Remainder must be taken to as to quabrate with the particular Effate. As if there be a Con-beyance to one for life, and if he dye without Issue, to another, this is a good Remainder upon Condition, and the Remainder shall rest upon the determination of the particular Effate, if the Tenant for life have no Iffue when he dyeth; but if a Man Convey to one, and the heirs of his body, and if he dye without Mue, to another, there it must be understood of a failer of Mue at any time; because the precedent limitation goes further then his life. But admitting there were no piecedent words to guide the intention, and that common parlance were against me, pet if there be but a possibility of a good construction, it shall be so construed: and they may bery well be understood of his dying without Mue of his body at the time of his beath. In Goodyer & Clerk's case in this Court : Trin. 12 Car. Rot. 1048. I confess it was adjudged, that it should be understood of a failer of Ic fue at any time; but in our case, if you hall not unversiand it of a failer of Isue at the time of his death. it cannot have any construction at all to take effect. T think there are no expels Authorities against me: those that may feem to be fo, I will put, and endeavour to give an answer to them: As for Child & Baylie's case, Reports differ upon the reason of that Judgment: For Cro. fays, it was held to be a void Devile, because it was taken, if he dye without Mue at any time during the term: But Sergeant Rolls goes upon another reafon: Rolls 613. there he fays it is void, because given absolutely to the Son and his Assigns before. In Rolls first part, 611. Leventhorp & Ashly's case, the Remainter there

there is faid to be boid, because when he had devised the term to A. and the Deirs Males of his body, it thall go to the Executors of A. and the Remainder there was to begin upon his dying without Isue at any time. The cafe of Saunders and Cornish will not come to ours: for there were many limitations for life successively to persons not in being, ec. In the case cited 1st Report, 135. of an Effate for life limited to one, and to every heir fuccef fively, an Estate for life, the limitation was naught, because it would make a perpetual free-hold: and no body would know where the absolute Effate sould best. So he prayed Judgment for the Plaintiff. Coleman for the Defendant. I conceive this to be a void limitation. Dr. Jones would make this a middle cale. I shall difcharge him of the first point, though he has taken pains to argue it: and I thall reft upon this, That the limitation of a term after the death of a man, without Iffice of his body, is void. The case is put as a middle case to these two; viz. If a man possessed of a Lease for years, Devise it to I. S. for life, the Remainder to J.N. for life, the Remainder to J. G. for life; these Remainbers are good. But if he do Devise to J. S. and the Deits of his body, the Remainder over; this Remainder he admits to be void, because it depends upon so remote a possibility as may never happen. Row I conceive it is the same thing to limit it to one for life, and if he bye without Mue, then to another for life, as to limit it to one and the peirs of his body, with a Remainder over. He would tye it up from the ordinary and Legal Construction, to issue at the time of his death. If it be to be understood of dying without Mue at any time, then Child & Baylie's case, and Cornishe's case, are full Authorities in the point. Vide 2 Cro. 459. Rolls, 612, 614. There Leffe for years bevileth to one for life, and after to Wms. and his Affigns, and if he due without Mue then living, the Remainder to I. G. fay is good in case of a fie-fimple, but they will not allow it in case of a term for years. Dow Mr. Jones would by Construction bying the words then living, into our case. The Legal Construction of the words, dying without Issue, is, if there be a failer of Thue at any time

to come. In Pell & Brown's case, if the words then living had not been in the Will, the case had not been fo adjudged. Keeling. You go up hill a little. Can Barnaby take fo long, as there is any Mue in being of Nicholas? Jones. He cannot. Keeling. Then Barnaby's Interest depends upon a Contingency, that may never happen. Jones I grant, if Nicholas hath Issue at the time of his death, that Barnaby shall never take, but if he hath none, he shall. Keeling. If I Devise Lands to A. for life, and if he due without Mue of his body, to B. A. shall have an Estate Tail. So in our case, the words and limitation is the same, though, the Devisor having but a Leafe for years, there cannot be an Effate Tail of it: yet he intended not that Barnaby should have any Effate as long as there were any Mue in being of Nicholas his body. Twisden. It appears to me upon the reason of the cases that have been cited, that the Remainder to Barnaby must be boid, because of the remote possibility: But then there will be a question, to whom the Remainder of the term will go, if Nicholas dye without Issue? whether to the Executors of Nicholas, or to the Executors of Doctor Love? If A. Tenant for life of a term, Devise it to B. foz life, the Remainder to C. foz life, the Remainder to D. foz life; I have heard it questioned, whether these Remainders are good og not? But it hath been held, that if all the Remainder-men are living at the time of the Devile, it is good: if all the Candles be light at once, good. But if you limit a Remainder to a person not in being, as to the first begotten Son, ec. and the like, there would be no end if fuch limitations were admitted, and therefore they are void. And some Judges are of the same Opinion to this If I Devile a term to A. fog life; after the death of A. his Executors thall not have it, but it thall go to the Executors of the Devilor: But if it be devifed to A. generally, without faying for life, it thall go to his Executors after his death. But a Devile for life bests in him only during his life, and you may make a limitation over. Keeling. I take it, that A. carries the whole term, when deviced to him for life: because an Effate for life is larger then the longest term. Twisden.

As a term for years doth admit of Remainders, so it doth of Reversions, if you will have it so; and when he debifeeh to A. during his life, A. thall have it for his life, but the Reversion thall be to the Devisors Crecutors. But if he Devise it to A. for life, and if he dre without Issue of his body, the Remainder to B. what shall become of the Reversion then? Keeling. You start a new point. Court, You shall have our Judgments this Term.

Knowles versus Richardson.

Rroz of a Judgment in the Common Pleas in an Action upon the Case for obstructing a Prospect. Sympton. The stopping of a Prospect is no Musance, and consequently no Action on the Case will lie for it. Aldred's Case 9th Report is express, that for obstructing a Prospect, being matter of delight only, and not of necessity, an Action will not lye. Twisden. Why may not I build up a Utall that another man may not look into my Pard? Prospects may be stopt, so you do not darken the light. Judgment, nis, &c.

Twisden. A man may be Indiced for Perjury in a Court- Baron.

Jones moved to have a Trial at Bar for Lands in Northumberland of 50 l. per annum. Keeling. Its a great way of off, and never any Jury came from thence in your time. Twisden. But I have been of Councel in Causes, wherein Trials have been granted at Bar for Lands there. We have lost Cornwall; no Juries from thence come to the Bar, and we shall lose Northumberland too. The other side to shew cause.

Keeling

Keeling upon a motion of Mr. Holt's, said; I have known many attachments for Arresting a man upon a Sunday; but still the Affidavic contained, that he might have been taken on another day. Twisd. So for arresting a man as he was going to Church, to disgrace him.

Term.

Term. Trin. 22 Car. II. 1670. in B. R.

Parker & VVelby.

D Action upon the Cafe against a Sherist for making The Plaintiff fets forth, that one a falle Return. Wright was endebted to him in 60 l. and did promile to pay him, and that thereupon a Wirit was fued out against him directed to the Defendant, being Sheriff of Lincolnshire, who took him into his custody, and after suffered him to go at large, whither he would, and at the day of Return, he returned that he had his body ready. Jones. They have demurred to the Declaration: which I conceive to be a good Declaration. For take the case, that there went a Latitat to the Sherist, and the Sherist took the person upon it, and let him go at large, no body will beny, but that an Action of Escape will lye against him: and when he makes fuch a falle Return, as here, that he has the body ready, why will not an Action lie for a falle Return? and this is no new case, but hath been adjudged Moor. plac. 596. 3 Cro. 460. ibid. 624. It is at the Plaintiffs Election to follow the Sheriff with Amercements, or to bring his Action for the falle Return. And when this Action has been brought formerly, they were forced to plead the Statute; none ever demurred generally. Twifden. I remember a cafe in 21 Car. 1. Rot. 616. between Franklyn & Andrews, where an Action upon the Case was brought against a Sheriff for such a falle Return: he pleaded the Statute, and they held in that case, that the Sheriff could not Return any thing else but Cepi corpus. And old Hodson, that fate here, remembred the case of Langton & Gardiner reported in 3 Cro. and faid, the Court did amerce the Sheriff for a bad Return; but the Judgment was given in that case for the Plaintiff, because there was a Traverse aliter vel alio modo, which could not be, unless a faile Return had been confessed, and the Court ordered Judgment to be entred for the Plaintiff for that cause. In the case of Franklyn, the Court held, that upon Issue Not-guilty, the Statute might be given in Euspence; but upon a Demurrer you ought to plead the Statute, and the general Demurrer cannot be held in this case, unless you will say that it is a general Law. Whelpdale's case is, that the Statute must be pleaded, because it is a particular Law: but it concerns Ertoxtson in all Sheriss; and the Statute of 13 Eliz. that concerns all Parsons, touching Mon-residency, is held to be a general Law: and it is not to be stirr'd now; but if the point were to be adjudged again, perhaps we might be of another Opinion. Keeling. They have relyed here upon the false Return, and the general Demurrer I take to be well enough. Morton & Rainsford accorded; wherefore Judgment was given against the Plaintiff.

Lake versus King.

be Plaintiff brought an Action upon the Cafe for publiffing a Libell, in which he was defamed, ec. the publication was in delibering several Printed Papers, wherein the Plaintiff was flandered, to several Dembers of a Committhe of the Poule of Commons. Jones. It is true, if a man make a complaint in a Legal way, no Action lyeth against him for taking that course, if it be in a competent Court. But that that we say is not lawful in this case, is his causing the matter to be Printed and Published: agreeable to this case are the common cases of Letters: if a man will write a frandalous Letter, and deliver it to the party himfelf, this is no Slander. But if he acquaints a third person with it, an Action will lie. So here, since he will publish this matter by Printing it, or if he had but written it, it might have been Actionable: for the Dembers ought not to be prepoffeffed.

King versus Standish.

A action upon the Statute of Præmunire for impeaching in the Chancery a Judgment given in the Kings-Bench. The Defendant bemurred. Bigland for the Defendant. The question is, whether the Court of Chancery be meant within the Statute of 27 Ed. 3. 3. This question has been controberted formerly, but has not been ffire'd within thele 40 years It concerns the Chancery, as it is a Court of Now the Statute cannot be applyed to the Chancery as fuch; for it was not a Court of Equity at that time; and if fo, then must the Statute be applyed to other Courts, where the gravamen then was. Mr. Lambert in his Juriloidis on of Courts, fays of this Court, that the King did at first betermine Causes in Equity in person: and that about 20 Ed. 3 the King going beyond Sea, delegated this power to the Chancelloz. And then he fays, several Statutes were made to enlarge the Jurisdiction of this Court, as 17 Rich.2. cap. 6. &c. But the Chancelloz took not upon him ex Officio, to determine matters in Equity, till Edward the Fourth's time. For till then it was done by the King in person, or he delegated whom he pleased. So that the Gravamen of that Statute could not be in the Chancery. 2. It is not possible that the King can be disinherited in his own Courts: and therefore the Statute must be understood of Courts, that stand in opposition to the Kings Courts, and only foxeign Courts. But this Court is held by the Kings Seal, and the Judgments in it are according to the Kings Conscience. Thirdlp, It is faid in the Statute, that the Offenders shall have a day given them to appear before the King and his Council, or in his Chancery, &c. and it is strange that the Chancery should give the remedy, if that were one of the Courts wherein the Offence were incurred. By fourth reason is from the penalty: the penalty is very rare and great: for they must be put out of the Kings Protection, their Lands forfeited, and their bodies impision'd at the Kings pleasure. The venalty is fitted well for those that draw the Kings Subjects out of the Kings Jurisdiction: but so great a penalty to be inflicted for luing in the Kings Courts, is not fo reasonable. If a man fue in the Eccletiastical Court for a matter Tempozal,

pozal, fhall he incur a Premunire? An Action upon the Cafe may lye, when a man is mistaken in the Court, in which he ought to fue, but to make it a Premunire feems not fo reafonable. The Usurpations of the Bishop of Rome were the cause of the making of this Statute, and all other Statutes of Pramunire: 28 Ed. 2. cap. 1. 16 H. 6. cap. 5. the com= plaint mas all along of the Bishop of Rome's Aluxpations; but not a word of the Chancery. Sir John Davies in his case of Pramunire tells us, that all the Statutes were made upon this occasion. Of all the Attainders of Præmunire, there never was one for fuing in the Chancerp. The great Objection is from these words in the Statute, (or which do fue in any other Court) now, say they, this last disjunctive must be applyed to this Court, and not to the Court of Courts mentioned befoze. But I answer, there were other Ecclesfiaffical Courts within this Realm, besides that that was a standing Court, and had a constant dependance upon the Pope here; and they were aimed at by this disjunctive. Those Courts veribed their Jurisviction from the Court of Rome, and not from the King. There is an Authority in the point in 5 Ed. 4. 6. Dow for Authorities, I confess there are great ones against me: 2 Cro. fol. 335. Heath & Ridley. Moor. 838. Courtney versus Glanvill. 999 Lord Coke in his Chapter of Præmunire. 22 Ed. 4. fol. 37. But the greateft Authority against me is the case of Throgmorton & Finch, reported by my Lord Coke in his Treatife of Pleas of the Crown, Chapter Pramunire. But the practice has ben contrary, not one person attainted of a Pramunire for that cause. King James his time the matter was referred to the Countel, who all agreed, that the Chancery was not meant within the Statute: which Opinions are involled in Chancery. And the King upon the report of their Reasons, ordered the Chancellor to proceed as he had done; and from that time to this, I do not find that this point ever came in question. And so he waved Judgment for the Defendant. Saunders. As to that objects on, that at the time when this Statute was made, there were no proceedings in Equity: I answer, that granting it to be true, pet there is the same mischief: The proceedings in one part of the Chancery are coram Domino Rege in Cancellaria, but an English Bill is directed to the Lord Reeper, and decreed: so that there is a difference in the proceedings of the same Court. But admit that Courts of Equity are

the ikings Courts, pet they are alia Curia, if they hold plea of matters out of their Jurisdiction. 16 Ri. 2. cap. 5. Rolls first part. 381. There is a common objection, that if there were no relief in Chancery, a man might be ruined : for the Common Law is rigozous, and adheres firially to its rules. I cannot answer this Objection better then it is answered to my hand in Dr. & Stud. lib. 1. cap. 18. he cited 13 Ri. 2. num. 20. Sir Robert Cotton's Records. It is to be confibered what is understood by being impeached: Row the words of another Act will explain that, viz. 4 H. 4. cap. 23. by that Ace it appears, that it is to brow a Judgment in question any other way then by Wirit of Erroz og Attaint. One would think this Statute to fully penned, that there were no room for an There was a temporary Statute which is at large in Rastall 31 H. 6. cap. 2. in which there is this clause; viz. That no matter determinable at Common Law, shall be heard elsewhere. A fortiori, no matter determined at Common Law thall be drawn in question elsewhere. Pecited 22 Ed. 4. 36. Sir Moyle Finch & Throgmorton, 2 Inft. 335. and Glanvill & Courtney's cafe. De put them also in mind of the artiche against Cardinal Woolsey in Coke's Jurisdiction of Courts, tit. Chancery. So he prayed Judgment for the Plaintiff. Keeling. It is fit that this cause be adjourned into the Brchequer-chamber, for the Opinions of all the Judges to be had in it. The know what heats there were betwirt my Logo Coke & Ellesmere, which we ought to aboid.

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Turner & Benny.

A Writ of Erroz was brought to reverte a Judgment in the Common Pleas in an Action upon the Case: wherein the Plaintist declared, that it was agreed between himself and the Defendant, that the Plaintist should surrender to the use of the Defendant certain Copyhold Lands; and that the Defendant should pay for those Lands a certain sum of money: and then he sets fouth, that he did surrender the said Lands into the hands of the Cenants of the Panoz out of Court, secundum consucudimem, &c. Exception. The points in to surrender generally, which must be understood of

of a furrender to the Lord or to his Steward: and the Declaration fets forth a furrender to two Tenants; which is an imperfed furrender: 1 Cro. 299. Keeling. But in that cafe there are not the words fecundum consuetudinem, as in this Jones. Hill. 22 Car. 1. Rot. 1735. betwirt Treburn & Purchas, two points were adjudged: 1. That when there is an agreement for a furrender generally, then fuch a particufar furrender is naught. 2. That the alledging of a furrens der secundum consuetudinem is not sufficient: but it ought to be laid, that there was luch a Custom within the Manoz, and then, that according to that Custom be surrendzed into, ec. accordingly is 3 Cro. 385. Coleman contra. The do fay that we were to furrender generally, and then we aver, that actually we did surrender secundum consuetudinem: and if we had faid no moze, it had been well enough. Then the adding, into the hands of two Tenants, &c. I take it that it thall not burt. Besides, we need not to alledge a performance, because it is a mutual promise, and he cited Camphugh & Brathwait's case Twisden. I remember the case of Treborne; he was my Clyent. And the reason of the Judgment is in Combe's case 9th Rep. because the Tenants are themselves but Attoznies. And they compared it to this cale: I am bound to levy a fine: it may be done either in Court og by Commission, but I must go and know of the person to whom I am bound, how he will have it, and he must direct me. principal cafe the Judgment was affirm'd, Nisi, &c.

Turner & Davies.

A Udita Querela. The point was this; viz. an Administrator recovers damages in an Adion of Trover and Conversion for Goods of the Intestate taken out of the possession of the Administrator himself: then his Administration is revoked, and the question is, whether he shall have Execution of the Judgment, notwithstanding the revocation of his Administration? Saunders. I conceive he cannot, for the Administration being revoked, his Authority is gone. Doctor Druries case in the 8th Report, is plain. And there is a President in the new book of Entries 89. Barrell. I conceive he

may take out Execution, for it is not in right of his Administration: he lays the Convertion in his own time: and he might in this case have declared in his own name; and he cites and arged the reason of Pakman's case, 6th Report, & 1 Cro. Keeling. He might bying the Action in his own name, but the Goods shall be Asiets. If Goods come to the possession of an Administrator, and his Administration be repealed, he shall be charged as Executor of his own wrong: now in this case, the Administration being repealed, shall he sue Execution, to subject himself to an Action when done? Twisden. I think it hath been ruled, that he cannot take out Execution, because his Title is taken away. Judyment per Cur. versus Defendentem.

Jordan & Martin.

Exception was taken to an Avolwy for a Rent-charge, that the Avolwant having distrained the Beasts of a Stranger for his Rent, does not say that they were levant & couchant. Coleman. The Beasts of a Stranger are not liable to a Distress, unless they be 1 want & couchant: Roll. Distress, 668. 672. Reignold's case. Twisd. Takete there is a Tussom for the Lord to seize the best Beast for a Heriot, and the Lord does seize the best Beast upon the Tenancy, it must come on the other side to shew that it was not the Tenants Beast. Keel. The Tattel of a Stranger cannot be distrained, unless they were levant & couchant; but it must come on the other side to show that they were not so. So Judic. pro Quer'.

Wayman & Smith.

A Prohibition was prayed to the Court of Bristol upon this suggestion; viz. That the cause of Action vid not arise within the Jurisdiction of the Court. Winnington. There was a case here between Smith & Bond: Hill. 17 Car. 2. Rot. 501. a Prohibition to Marleborough: the suggestion grounded on Westm. 1. cap. 34. granted: And there needs not a Plea in the Spiritual Court, to the Jurisdiction: so that he cited; F. N. B.

F. N. B. 49. But he faid, he had an Affidavit, that the cause of Action did artse out of their Jurisdiction. Twisden. I doubt you must plead to the Jurisdiction of the Court. I remember a case here, wherein it was held so: and that if they will not allow it, then you must have a Prohibition. Windington. Fitzherbert is full. Ruled, that the other side shall shew cause why a Prohibition should not go, and things to stay.

Humlock & Blacklow.

The upon a Bond for performance of Covenants in Articles of agreement. The Plaintiff covenanted with the Defendant to assign over his Crave to him, and that he should not endeavour to take away any of his Customers; and in consideration of the performance of these Covenants, the Defendant div Covenant to pay the Plaintiff 60 l. per annum during his life. Saunders. The words in consideratione performationis, make it a Condition precedent: which must be averged: 3 Leon. 219. and those Covenants must be actually performed. Twisden. How long must he stay then, till he can be entitled to his Annuity? as long as he lives? for this Covenant may be broken at any time. Thats an Exposition that corrupts the Cext. Judic. nisi, &c.

It was moved by one Hunt, that the Venue might be changed in an Acion of Indebitat. Assumptit, brought by Mr. Wingfield. Jones. I conceive it ought not to be changed, being in the case of a Counsellor at Law, by reason of his attendance at this Court. Twisd. In Mr. Bacon's case of Grays-Inn, they resuled to change the Venue in the like case. So not granted.

An Indiament against one Morris in Dendigh-shire, for Murther, was removed into the Kings Bench by Certiorari, to prevent the Prisoners being acquitted at the Grand-Sessions; and the Court directed to have an Indiament found against him in the next English County; viz. at Shrewsbury. Vide infra.

Taylor & Rouse, Church-mardens of Downham, versus their Predecessors.

The Action was, to make them Account for a Bell. They plead, that they velivered it to a Bell-founder, to mend, and that it is yet in his hands. The Plaintiff demurs; the cause of his Demurrer was, that this was no good Plea in Bar of the Account, though it might be a good Plea before Auditors. I Roll 121. Pemberton. I conceive it is a good Plea; for wherever the matter or cause of the Account is taken off, the Plea is good in Bar. But he urged, that the Action was brought for taking away bona Ecclesia, and not bona Parochianorum, as it ought to have been. Court. The Property is not well laid. So ordered to mend all, and plead de novo.

K

Term.

Term. Mich. 22 Car. II. 1670. in B. R.

Magnetition was returned upon the Statute against pulling bown Inclosures. They took Issue as to the damages only. It was moved, that before the Trial for the damages, there might be Judgment given to have them let up again, having been long down-Twisden. When you have Judgment for the damages, then one Distringas will serve for setting up the Inclosures and the damages too. As in an Action, where part goes by default, and the other part is traversed, you shall not take out Execution, till that part which is traversed be tried.

Apon a motion by Mr. Dolbin for an Attachment, Twisden said; if a man has a Suit bepending in this Court, and be coming to Cown to prosecute or defend it here, he cannot be sued essewhere. But if a man come hither as a Mitness, he is protected eundo & redeundo.

Wootton & Heal.

A Nation of Covenant was brought upon a Warranty in a fine, a term for years being Eviced. Saunders. Jacknowledge, that an Acion of Covenant does well lye in this case: but the Plaintist assigns his dreach in this; viz. that one Stowell havens legale jus & titulum, did enter upon him and evict him; which perhaps he did by virtue of a title derived from the Plaintist himself: 2 Cro. 315. Kirby & Hansaker. Jones contra. To suppose that Stowell claimed under the Plaintist, is a sozeign intendment: and it might as well come on the Defendants side to show it: And since that case in 2 Crook, the Statute of 21 Jac. and the late Act, have much strengthned Aerdicks. Twisden. The Statutes do not help when

when the Court cannot tell how to give Judgment. The Plaintist ought to entitle himself to his Action, and it is not enough if the Jury entitle him. Jones. You have waived the title here, and relyed upon the Entry of the Issue only, which is non intravit, &c. Cur. advisare vult.

Lassells & Catterton.

D Action of Covenant for further assurance, the Cove nant being to make fuch Conbevance, ec. as Counfel thould advice; they alledge for breach, that they tended such a Conveyance as was adviced by Countel; viz. a Leafe and Release, and set it forth with all the usual Covenants. Levings moved in Arrest of Judgment; I conceive they have tendeed no fuch Conveyance as we are bound to execute; for we are not obliged to Seal any Conveyance with Covemants, not with a Warranty. Belives, that which they have tendzed, has a Warranty, not only against the Covenantoz, but one Wilson: 2 Cro. 571. I Rolls 424. Again, our Covenantis, to convey all our Lands in Bomer : and the Conveyance tended, is of all our Lands in the Lordhip of Bomer. Twisden. For the last exception, I think we shall intend them to be both one: And I know it bath been held, that if a man be bound to make any such reasonable assurance, as Counsel Mall advise, usual Covenants may be put in; for the Covenant hall be so understood. But there must not be a Marranty in it: though some have held, that there may be a Marranty against himself; but I question whether that But Weston on the other side said, that the Dbjection as to the Alarranty was fatal, and he would not make any defence.

The King versus Morris. Vid. sup.

R. Attomey Finch shewed cause why a Certiorari should not be granted to remove an Indiament of Hurber out of Denbighshire in Wales. Twisden. In 2 Car. & 8 Car. it was held, that a Certiorari did sye into Wales. Morton. By 34 H. 8. the Justices of the great Sessions have power to try all Hurthers, as the Judges here have, and the Statute of 26 H. 8. for the Crial of Hurthers in the next English County, was made before that of the 34 H. 8. Twisden. I never yet heard that the Statute of 34 H. 8. had repealed that of 26 Henr. 8. It is true, the Judges of the Hand Sessions have power, but the Statute that gives it them, does not exclude this Court. To be moved when the Chief Justice should be in Court.

Franklyn's Cafe.

Ranklyn was brought into Court by Habeas Corpus, and the Return being read, it appeared that he was committed as a Preachet at Sevitious Conventicles. prayed he might be discharged; he said this Commitment must be upon the Oxford Act: for the last Act only orders a Conviction; and the Act for Aniformity, Commitment only after the Bishops Certificate. And the Oxford Act provides, that it that be done by two Justices of the Peace upon Dath made before them: and in this Return, but one Juffice of Peace is named; for Sir William Palmer is mentioned as Deputy Lieutenant, and you will not intend him to be a Juffice of Peace. Poz does it appear that there was any Dath Twisden. Apon the Statute of the 18th made befoze them. of the Queen, that appoints, that two Justices shall make Diders for the keeping of Bastard-children, whereof one to be of the Quorum, I have got many of them quash'd, because it was not expect, that one of them was of the Quorum. Whereupon Franklyn was discharged.

Apon a motion for time to plead in a great cause about Brandy, Twisden said, if it be in Bar, you cannot demand Over of the Letters Patents the next Term; but if it be in a Replication, you may: because you mention the precedent Term in the Bar, but not in the Replication,

Yard & Ford.

Moved by Jones in Arrest of Judgment; an Action upon the Cale was brought for keeping a Parket without Warrant, it being in prejudice of the Plaintists Parket. De moved, that the Action would not lie, because the Defendant did not keep his Parket on the same day that the Plaintist kept his: which he said is implied in the case in 2 Rolls 140. Saunders contra. Apon a Writ of Ad quod dampnum, they enquire of any Parkets generally, though not held the same day. In this case, though the Defendants Parket be not held the same day that ours is, yet it is a damage to us in sozestalling our Parket. Twisden. I have not observed that the day makes any difference. If I have a fair of Parket, and one will erect another to my prejudice, an Action will lye; and so of a Ferry. Its true, so one to set up a School by mine, is damnum absque injuria. Ordered to be moded again.

Pawlett moved in Trespals, that the Defendant pleaded in Bar, that he had paid 3 l. and made a promise to pay so much more in satisfaction; and said it was a good plea, and did amount to an accord with satisfaction; an Action being but a Contract, which this was. Twisden. An Accord executed is pleadable in Bar, but Executory not.

Twisden. There are two clauses in the Statute of Alury; if there be a country agreement at the time of the lending of the money, then the Bonds and all the Asiarances are void: but if the agreement be good, and afterward he receives more than he ought, then he foresits the trebte value.

Bonne-

Bonnefield.

That his name was Bonnefield, and the Cap. Excom. was against one Bromfield. Twisden. You cannot plead that here to a Cap. Excom. You have no day in Court, and we cannot Bail upon this; but you may bying your action of Falle Inpusionment.

Caterall & Marshall.

A Ction upon the Cale, wherein the Plaintist declares, that in consideration that he would give the Defenant a Bond of sufficient penalty to save him harmless, he would, ac. and sets footh, that he gave him a Bond with sufficient penalty, but does not eppress what the penalty was. This was moved in Arrest of Judgment. Jones. After a Aerdict it is good enough, as in the case in Hob. 69. Twisd. If it had been upon a Demurrer, I should not have doubted but that it had been naught. Rainsford & Morton. But the Jury have judged the penalty to be reasonable, and have found the matter of sac. Twisden. The Jury are not Judges what is reasonable, and what unreasonable: but this is after a Aerdict. And so the Judgment was affirm'd, the cause coming into the Kings Bench upon a Witit of Erroz.

Martin & Delboe.

A M Action upon the Cale, setting forth, that the Defendant was a Perchant, and transmitted several Goods beyond Sea, and promised the Plaintist, that if he would give him so much money, he would pay him so much out of the proceed of such a parcel of Goods as he was to receive from beyond

beyond Sea. The Defendant pleaded the Statute of Limitations, and both not lay, non affumplit infra fex annos, but that the cause of Action did not arise within sir years. Plaintiff demurs, because the cause is between Derchants, ac. Sympson. The plea is good; Accounts within the Statute must be understood of those that remain in the nature of Accounts: now this is a sum certain. Jones accorded. This is an Action upon the Cafe, and an Action upon the Cafe between Derchants is not within the exception. And the Defendant has pleaded well in faying, that the cause of Action of not arise within fix years: for the cause of Action ariseth from the time of the Ships coming into Port; and the fix years are to be reckoned from that time. Twisden. I'never knew but that the word Accounts in the Statute was taken only for actions of account. An infimul computatiet brought for a fum certain, upon an Account flated, though between Perchants, is not within the Exception. So Judgment was given for the Defendant.

The King versus Leginham.

A 19 Information was exhibited against him for taking unreasonable Diffreffes of several of his Tenants. Jones mobed in arrest of Judgment, that an Information would not the for such cause. Marlebr. cap. 4. saith, that if the Lord take an unregionable Diffress, he thall be amerced, fo that an Information will not lye. And my Lord Coke upon Magna Carta, fays, the party griebed may have his Action upon the Statute: but admit an Information would lye, yet it ought to have been more particular, and to have named the Tenants; it is not fufficient to lay in general, that he took unreasonable Diffreffes of several of his Tenants. And the second part of the Information, viz. that he is communis oppressor, is not sufficient: Rolls 79. Moor 451. Twisden. It hath so been adjudged, that to lay in an Information, that a man is communis oppressor, is not good. And a Logo cannot be indicted for an excellive Diffress, for it is a private matter, and the party ought to bring his Action. To flay.

Hamari

Haman & Truant.

A A Action upon the Tale brought upon a bargain for Toxic and Heals, etc. The Defendant pleads another Action depending for the same thing. The Plaintist replies, that the bargains were several; absque hoc, that the other Action was brought for the same cause. The Defendant demurs specially, for that he ought to have concluded to the Country. Polyxsen. When there is an affirmative, they ought to make the next an Issue, or otherwise they will plead in infinitum. 3 Cro. 755. and accordingly Judgment was given for the Defendant.

Fox & alii Executors of Mr. Pinsent. Vide supra 47.

Ndebitat. Affumpfit: The Defendant pleads, that two of the Plaintiffs are Infants, and pet they all Sue per At-The question is, if there be two Executors, and one of them under age, whether the Infant must sue per Guardianum, and the other per Attornatum, og whether it is not well enough, if both fue per Attornat.? Offley spake to it, and cited 2 Cro. 541. Pasch. 11 Car. 288. Powell's case, Styles 318. 2 Cro. 577. 1 Inft. 157. Dyer 338. Morton. 3 am of Opinion that he may Sue by Attorney, as Executor: though if he be Defendant, he must appear by Guardian. Rainsford. I think it is well enough; and I am led to think to by the multitude of Authorities in the point: And I think the case Aronger when Infants joyn in Actions with persons of full he Sues here in auter droit; and I have not heard of any Authority against it. Twisden concurred with the rest. and to Judgment was given.

Moreclack & Carleton.

Pleas, one Erroz assigned was, that upon a relicta verificatione, a misericordia was entred, whereas it ought to have been a capiatur. Twisden. The Common Pleas ought to certifie us what the practice of their Court is. Monday the Secondary said, it was always a Capiatur. Its true in 9 Edw. 4. it is said, that he shall but be amerced, because he hath spared the Jury their pains; and 34 H. 8. is accordingly: but say they in the Common Pleas, a Capiatur must be entred, because dedicit sactum sum. So they said they would discourse with the Judges of the Common Pleas concerning it.

The King versus Holmes.

Dued to quash an Indiament of Forcible Entry sitto a Messuage, passage or way: so that a passage of way is no Land not Tenement, but an Easement: and then it is not certain whether it were a passage over Land of Alater: Yelv. 169. the word passagium is taken so a passage over Alater. Twisd. You need not labour about that of the passage; we shall quash it as to that: but what say you to the Pessuage? Jones. It is naught in the whole: so it is but by way of recital, with a quod cum, he was possess, it. Et sic possessionatus, &c. but that Twisden sato, was well enough. Jones. Then he saith, that he was possessed de quodam Termino: and both not say annorum. Twisden. That's naught: And the Indiament was quash'd.

An Action was brought against the Hundred of Stoak, upon the Statute of Hue and Cry: and at the Crial, some House-keepers appeared as Mitnesses, that lived within the Hundred, who, being examined, said they were Poor, and path no Cares nor Parish Duties: and the question was, whether they were good Mitnesses of not? Twisden. Alms-people and

Servants are good Witnesses: but these are neither. Then he went down from the Bench to the Judges of the Common-Pleas, to know their Opinions; and at his return said, That Judge Wyld was consident that they ought not to be swon, and that Judge Tyrrell doubted at first; but afterwards was of the same Opinion: their reason was, because when the money recovered against the Pundzed Hould come to be sevied, they might be worth something.

Hoskins versus Robins. Hill. 23 Car. 2. Rot. 233.

12 this case these points were spoke to in Arrest of Judgment, viz. 1. Whether a Custom to have a several Paflure excluding the Lord, were a good Custom, or not? was faid, that a prescription to have Common so, was void in Law; and if to, then a prescription to have sole Pasture, which is to have the Grafs, by the mouth of the Cattle, is no other then Common appendant: Daniel's case i Cro. so that Common and Passurage is one and the same thing. They say that it is against the nature of Common, for the very word Common supposeth that the Lord may feed. I anfiver, if that were the reason, then a man could not by Law claim Common for half a year, excluding the Lord: which may be done by Law. But the true reason is, that if that were allowed, then the whole profits of the Land might be claimed by prescription, and so the whole Land be prescribed foz. The Lord may grant to his Tenants to have Common, ercluding himself: but such a Common is not good by pre-The fecond point was, whether or no the prescription here not being for Beaffs levant & couchant, were good of not? for that, a difference was made betwirt Common in groffe and common appendant, viz. That a man may prescribe for Common in grosse without those words; but not for Common appendant. 2 Cro. 256. 1 Brownl. 35. Noy 145. 15 Edw. 4. fol. 28. 32. Rolls, tit. Common 388. Fitz. tit. Prescription, 51. a third point was, whether or no these things

are not help'd by a Aerdia? As to that, it was alledged, that they are defects in the Title, appearing on Record: and that a Aerdict both not help them. Saunders contra. In case of a Common, such a prescription is not good, because it is a contradiction, but here we claim folam Pasturam. Row what may be good at this day by grant, may be claimed by prescrip-As to the Exception, that we ought to have prescribed for Cattle levant & couchant: its true, if one doth claim Common for Cattle, levant & couchant is the measure for the Common, untels it be for so many Cattle in number: but here we claim the whole Derbage; which perhaps the Tattle levant & couchant will not eat up. Hales. Motwithflanding this prescription for the sole Pasture, yet the Soil is the Logos, and he has Pynes, Trees, Buthes, ac. and he may dig for Curfes. And such a grant, viz. of the sole 19aflurage, would be good at this day. 18 Edw. 3. though a grant by the Lozd, that he will not improve, would be a void grant at this day. Twisden. My Lord Coke is express in the point. A man cannot prescribe for sole Common, but may prescribe for sole Pasture. And there is no Authority against him. And for levant & couchant; it was adjudged in Stoneby & Muckleby's case, that after a Clerdict it was help'd. And Judgment was given accordingly.

Anonymus.

A Nation of Trespals was brought for taking away a Tup, till he paid him 20 shillings. The Defendant pleads, that ad quandam curiam he was amerced, and that for that the Tup was taken. Hales. The cannot tell what Court it is, whether it be a Court-Baron by Stant or Prescription; if it be by Stant, then it must be coram Seneschallo; if by Prescription, it may be coram Seneschallo, or coram Sectatoribus, or coram both. Then it does not appear, that the Pouse where the Trespals was laid, was within the Panor: Then he doth not say infra Jur. Cur'. It was put upon the other side to shew cause.

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Jacob

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Jacob Hall's Case.

Me Jacob Hall a Rope-dancer, had erected a Stage in Lincolns-Inn-fields: but upon a Petition of the Inhabitants, there was an Inhibition from Whitehall: now upon a complaint to the Judges, that he had erected one at Charingcrofs, he was fent for into Court: and the Chief Juffice told him, that he understood it was a Nusance to the Parish: and some of the Inhabitants being in Court, said, that it did occasion Beoples and Fightings, and drew so many Rogues to that place, that they lost things out of their Shops every Afternoon. And Hales said, that in 8 Car. 1. Noy came into Court, and prayed a Airit to prohibit a Bowling-Aily erected near St. Dunstans Church, and had it.

Sir Anthony Bateman's Case.

IN the Trial at Bar, the Son and Daughter of Sir Anthony Bateman were Defendants: the Action was an Ejectione Firmæ. The Defendants admitted the point of Sir Anthony's Bankrupcy: but fet up a Conveyance made by Sir Anthony to them for the payment of 1500l. apiece, being money given to them by their Grandfather, Mr. Russell, to whom Sir Anthony took out Administration. Hales. It is a voluntary Conveyance, unless you can prove that Sir Anthony had Gods in his hands of Mr. Russell, at the time of the executing it. So they proved that he had, and there was a Aerdice for the Defendants.

Legg & Richards.

E Jeckment. Judgment against the Defendant, who dies, and his Executor brings a write of Error, and is non-suited. It was moved that he should pay Coss. Twisden. An Executor is not within the Statute for payment of Coss occasione dilationis. Hales. Jam of the same Opinion.

Harwood's Cafe.

The was brought to the Bar by Habeas Corpus: being committed by the Court of Albermen for marrying an Dyphan without their consent. Sol. North. Ale conceive the Return insufficient, and that it is an unreasonable Custom to impose a Penalty on a man for marrying a City-Dyphan in any place of England. Now we marryed her far from London, and knew not that she was an Dyphan. Then they have put a Kine of 40 l. upon him, whereas there is no cause why he should be denied Barriage with her, there being no disparagement. Twisden. Mr. Waller of Berkingssield was imprison dix months sor such a thing. So the money was ordered to be brought into Court. Vide infra 79.

Leginham & Porphery.

Replevin and Avowy for not doing Suit. The Plaintiff lets forth a Custom, that if any Tenant live at a distance, if he comes at Michaelmas and pay eight pence to the Lord, and a penny to the Steward, he shall be excused for not attending; and then says, that he tended eight pence, ac. and the Lord resuled it, ac. Polynxfen. I know no case where payment will do, and tender and resulal will not do. Hales. Dave you averred, that there are sufficient Copy-holders that the near the Mannor? Polynxfen. The have averred, that there

there are at least 120. Hales. Surely tender and refusal is all one with payment. Twisden. An Award is made, that super receptionem, &c. a man should give a Release, there tender and resulal is enough. Judgment so the Defendant.

Waldron versus &c.

Ales. It is true, one Parish may contain the Mills. The Parish of A. may contain the Wills of A. B. and C. that is, when there are diffect Constables in every one of them. But if the Constable of A. doth run through the whole, then is the whole but one Aille in Law. Dz where there is a Tything-man, it may be a Uille: but if the Constable run through the Tything, then it is all one Aille. I know where three or four Thousand I. per annum hath been enjoyed by a fine levied of Land in the Wille of A. in which are five several Damlets, in which are Tythings; but the Constable of A. runs through them all, and upon that it was held good for here was a case of the Constable of Blandford-Forum, wherein it was held, that if he had a concurrent Jurisdiction with all the rest of the Constables, the Fine would have passed the Lands in all. In some places they have Tythingmen and no Constables. Polynxfen. Lambard 14. is, that the Conffable and the Cything man are all one. Hales. That is in some places. Præpositus is a proper word for a Constable. and Decemarius for a Tything-man.

An Indiament for retaining a Servant without a Testimonial from his last Paster. Poved to quash it, because it wants the words contra pacem. 2. Because sey do not thew in what Trade it was. So quash'd.

Hoved to quath another Indiament, because the year of our Lord, in the Caption, was in Figures. Hales. The year of the King is enough.

Poved

Moved for a Prohibition to the Spiritual Court, for that they Sue a Parish for not paying a Rate made by the Church-wardens only, whereas by the Law, the major part of the Parish must joyn. Twisden. Perhaps no more of the Parish will come together. Counsel. If that did appear, it might be something.

Hales. A Wirit of Erroz will lie in the Erchequer-Chamber of a Judgment in a Scire facias, grounded upon a Judgment in one of the Actions mentioned in the 27 of Eliz. cap. 8. because it is in effect a piece of one of the Actions therein mentioned.

Harwood's Cafe.

E was removed out of London by Habeas Corpus; the Return was, That he was fined and committed there for marrying a City-Diphan without the confent of the Court of Aldermen. Exception 1. They do not say that the party was a Citizen, or that the Parriage was within the City: and they are not bound to take notice of a City Diphan out of the City, for their Customs extend only to Citizens in the City. Exception 2. They have not thewed that we had reafonable time to thew cause, why we thould not be fined. Twisden. These Dbjections were over ruled in one Waller's Afterward in the same Term Weston spake to it. There are two matters upon which the validity of this Return doth depend; viz. The Custom and the Offence within the Cu-The Custom is laid, that time out of mind the Court of Aldermen have had power to let a reasonable fine upon fuch as flould marry an Dyphan without their leave, and upon refusal to pay it, to impasson him. I conceive this Custom, as it is lato, to be unreasonable: it ought to be locally circumscribed, and confined to the City: 17 Ed. 4. 7. there was an Action brought upon the Statute of Labourers, for retaining one that was the Plaintiffs retained Servant: the Defendant pleaded in abatement, that there was no place laid where the Plaintiffs retainer was: and this was held a good

good Plea; for that if it were in another County then where the Defendant retained him, it was impossible for the Defendant to take notice of a Retainer in another County. Do moze can we take notice who is a City Dyphan in the County of Kent. Then, they have returned a Cufrom to impailon generally; but it should have been, that without reasonable cause shewn they might impasson, and the party have liberty to thew cause to the contrary. Then, I conceive they have returned the fact as defei ctive as the Custom: they say, that he marryed her without their confent; they ought to have fait, that he took her out of their custody: and your Logothips will not intend that the was in their custody, when the was out of the City. Offley of the same side; and cited 21 Ed. 3. Fitz. Guard. 31. and Hob. in Moor & Hussey's case, 95. 3 Cro. 803. 3 Cro. 689. 1 Cro. 561. In all the cales its returned that they were free-men of the City. Mr. Solicitor North on the same side, cited Day & Savage's case. Mr. Attorney General on the other side said, that because it was impossible to give notice to all, therefoze ex necessitate rei, they must take notice at their peril. Hales. The City has an Interest in the Dyphan, wherever the Dyphan be. And for notice, he may enquire; there is no impossibility of his coming to the knowledge whether the be an Dyphan oz no; therefoze if he takes her, he takes her at his peril. Twisden. And for the fine, such a fine was let in Langham's Case, and adjudged good. Let a Citizen of London live where be will, his Children thall be Dyphans. Hales. Some things are local in themselves; some things adherent to the person, and follow the person; now this is an Interest which follows the person, and is transmitted to his Children: and the party must take notice of it at his peril.

Cox & St. Albanes.

A Prohibition was prayed for to the City of London, because the Defendant had offered a Plea to the Jurisdiction sworn, and it had been refused. Hales. In transitory Actions, if they will plead a matter that ariseth out of the Jurisdiction, and swear it before Imparlance, and it be refused, a Prohibition thall go. There was a case, in which it was adjudged; 1. That upon a bare surmise, that the matter ariseth out of the Jurisdiction, the Court will not grant a Prohibition. 2. It must be pleaded, and the Pleas sworn, and it must come in before Imparlance. If all this were done, we would grant a Prohibition here. It was also agreed in that case, that the party should never be received to assign for Error that it was out of the Jurisdiction, but it must be pleaded. Twisd. So in this Court, when there is a Plea to the Jurisdiction, as that it is within a County Palatine, they plead it before Imparlance, and swear their Plea.

Twisden. There was a Venire facias returnable coram nobis apud Westm. whereas it should have been ubicunque fuerimus, &c. yet because the Court was held here, it was held to be good. Hales. I remember it. Hales. When in an inferiour Court the Venire facias is ad prox. Cur', it is naught, because it is uncertain when the Court will be kept. But if it be at such a day ad prox. Cur. it is good.

Anonymus.

A Write of Erroz of a Judgment in White-chappel. After the Recozd was read, Hales said, the acts of a Court dught to be in the present Tense, as præceptum est, not præceptum fuit. But the acts of the party may be in the Preterpersed Tense: as venit & protulit hic in Cur' quandam querelam suam; And the Continuances are in the Preterpersed Tense, as venerunt, not veniunt. But upon another Exception the Court gave time to move it again.

Moved for a melius inquirendum to be granted to the Coroner of Kent, who had returned an Inquilition concerning the death of one that was killed within the Manoz of Greenwich: he had returned, that he dyed of a Weagrim in his head, when he was really killed with a Coach. Hales. A melius inquirendum is generally upon an Office post mortem, and is directed to the Sheriff. Twisden. But this cannot be to the Sheriff. In 22 Ed. 4. the Cozoner must enquire only super visum corporis. And if you will have a new inquity, you must quash this. Indeed a new inquiry was granted in Miles Bart-Thurland prayed that the Court, being the supreme Tozoner, would examine the misdemeanoz of the Tozoner. Hales. Wake some Dath of his misdemeanoz, because he is a Twozn Officer. Without Dath we will not quath this Inqui-Newdigate fato, that in the case of Miles Bartly the fition. inquiry was not filed, and that that was the reason why a new one was granted. Hales. Let the Cozoner attend; be must take the Evidence in writing; and he should bring his Examination into Court.

Daniel Appleford's Case.

Wirit of Mandamus was directed to the Walter and fellows of Mew Colledge in Oxford, to restoze one Daniel Appleford a Fellow. They return, that the Bishop of Winchester did erect the Colledge, and among other Laws. by which the Colledge was to be governed, they return this to be one, viz. That if a Scholar, og other Wember of the fait Colledge, should commit any crime, whereby scandal might arise to the Colledge; and that it appeared by his own confession, of full Evidence of the Fact, that then he should be removed without any remedy: and that Daniel Appleford a Fellow, was guilty of enormous Crimes, and was convicted, and thereupon removed: and they pray Judgment whether this Court will procedo? Jones. By this conclusion they rely chiefly upon the Jurisdiction of the Court. I will lay this for a ground, that this Court hath Jurisdiction in Extrajudicial causes as well as Judicial: 11 Rep. Bagg's case. And

Appleford bath no remedy but this. I will not fay, that he may not have an Action upon the Case, but by that he will not recover the thing, but damages. And for an Affize; if aman be a Corporation fole, of head of a Copposation aggregate, and be turn'd out wrongfully, he may have an Affize: but for a man that is but an inferiour Dember of a Copposation, no Affize lyeth for him: because he is but a part of the body politick, and both not fand by himself, but must joyn with others; and as he cannot have an Affize, to be cannot have an Appeal: Dyer, 209. & 11 Rep. in Bagg's cafe. 24 H. 8. 22. 25 H. 8. cap. 19. 4 Inft. 340. by these Authorities, it appears that we are without remedy by way of Appeal. It may be objected, that there can be no Appeal hither, because it is a spiritual Comoration. Now I say, this is not a spiritual Copposation, as appears by the foundation: and I am of Opinion, that if a Copporation be all of spiritual persons, yet unless there be a spiritual end, it is no spiritual Copposation, but a Lay-one. if it be a spiritual Corporation; yet Depuvation is a temporal act: Dyer 209. Another Objection may be, That the founder hath provided that there hall be no Appeal. I answer, the founder cannot by his foundation exclude Legal remevies against wrong. A Custom, which is the strongest foundation, both not bind a man up from his Legal remedy: Litt. Sect. 212. If a man hould dispose of his Effate by Mill. and provide therein, that if any difference thould arise concerning the Execution of the came, that it Mall be Determined by fuch and fuch, and no Suit commenced upon it at the Common Law, this would be a vain appointment: he must not ered a Jurisdiction of his own, to oull the Kings Courts of theirs. Coleman. I conceive this is such a Colledge, as no Mandamus thall go to it in any case whatsoever: for it is but a private Society, and bath no influence upon the publick. In Ryly's Records we find, that Mandamus's were only Letters to Colledges, ec. and there were no Judicial Mandamus's till Bagg's case; and I never knew them go, but when the party had not only a free hold, but one that was of publick concern. Row a fellowship of a Colledge is for a mipate belign, only to fludy: and if you grant a Mandamus in this case, whither will it go at last? Then the Foundation mas to a spiritual intent; and what is committed to the Ecclefiaffical Power and Jurisdiction, this Court both preferve. Ecclesiastical men hold in Eleemosynam: Litt. Sect. 136. Lin-99 2

wood de Religiosis domibus. When Colledges are founded under rule and order, it doth give the Bishop Jurisdiction: Ca that this Court will not enquire into this matter, no more than it will enquire into causes of Deprivation, and matters relating to the Institution of Clergy-men. It has been denice, that a fellow of a Colledge can bying an Affize. But as a Debend hath two capacities, fole and aggregate: fo a Fellow is a Dember of a Corporation aggregate, and hath a fole capacity in respect of his fellowship. Foz a Church-Marden who is admitted according to the course of the Ecclesiastical Law, a Mandamus will not lie: Vide 6 H. 7. 10. Twisden. In one Patrick's case, we all held that a Colledge was a Temporal Topporation. Hales. There is a reason given in Dyer why a Mandamus will not lye in the case there, viz. because it was prayed to be awarded to a Temporal Coppozation. Coleman. It both appear by the Return, that the Founder hath appointed a Clifitoz, now to him there may be an Appeal; and we have returned the Sentence of the Cliff. toz, and need not return the cause of the Sentence. And for Books, I do oppole Rolls, tit. Prerogative, Huntly's case, 209. to Specott's case, and Ken's case in the Reports. In our case the party has a remedy elsewhere, and therefore he shall not come hither. If a Mandamus fhall lie for a Dafterthip, Fellowship or Schollarship, it will in time come to lie for turning out of Commons, and what a combustion will this raise then? The Miceties of Husband and Alife were faid by the Judges in Scott's case, to be proper for the Spiritual Court, and not fit to be brought before the Judges. Hales. That a Mandamus lies, I will not politively deny; but whether is it fit for us to proceed after this Return? It must be taken for granted, that it is not a wicitual Composation; if it were, you ought to Appeal to the Clifitoz, and then to the Dele-It is a private Society, as an Inns of Court: and I confess, that Mandamus's do generally respect matters of publick concern. I never heard of a Mandamus for a Monk. If there be a Iurisdiction in the Clifitor, and he hath determined the matter, how will you get over that Sentence? The Chancellog is Clifitog of all the Kings fræ Chappels, and the 2 H. 5. both make him to of all Colledges of the Kings Foundation. Suppose a Tempozal Court, over which we have Jurisdiction, do give Judgment in Affize to recover an Office: so long as that Judgment stands in force, do you

think that we will grant a Mandamus to restoze him against whom the Judgment is given? Twisden. In all Eleemosinary things there are Assistance appointed either by Law, oz by Creation of the party. Hales. The Free Chappels of Windsor and Wolverhampton are not of Spiritual Jurisdiction. Hales. At this rate we should examine all Depuivations, Suspensions, Elections, &c. and by the 13 of the Qu. the Laws of the University are consistend. Hales. Ale ought not to grant a Mandamus where there is a Assistance; but in this case the Assistance hath given Sentence.

Mors & Sluce.

Trial at Bar. An Action upon the case was brought against a Waster of a Ship, who had taken in Soods to Cransport them beyond Sea, for that he so negigently kept them, that they were folen away whilft the Ship lay in the River of Thames. Maynard inlifted upon it, that the Maker was not chargeable: fay they, he is chargeable whilek he is here, but when he is gone out of the Realm, he is not chargeable, though the Soods be taken from him. Alhich distinction, he said, had no foundation in Law. Hales. It will lye upon you that are for the Defendants, to thew a difference betwirt a Carrier and a Waster of a Ship. And it will lye upon you that are for the Plaintiff, to thew why the Hafter of a Ship hould be charged for a Robbery committed within the Realm, and not for a Pyracy committed at Sea. It was urged for the Plaintiff, that a boy-man and Ferry-man are bound to answer, and why not the Master of a Ship? The Defendant proved that there was no carelefness nor negligent default in him. Maynard. De is not chargeable, if there be no negligence in him, because he is but a Servant, the owner takes the freight. Hales. De is Exercitor navis, If we hould let loofe the Baffer, the Berchant would not be fecure. And if we should be too quick upon him, it might difcourage all Daffers: fo that the confequence of this cale is great. But the Jury gave a Clerdia for the Defendant; the Court, for the reasons aforesaid, inclining that way.

Portet

Porter & Fry.

Jectione firmæ, A special Merdia. The case was; A man deviceth to A. fog life, the Remainder to one and the Deirs of his body, upon condition, That if he marry without consent of such and such, or dpe without peirs of the body of his Dother, that then the Effate hall go to another and his beirs. De marries without their consent, and he in the Remainder enters. Mr. Attorney Finch. The first question will be, whether this Proviso be a Condition of a Limitation? 2. Whether notice be requisite in this case, og not? For the first, I take it to be a Limitation, and that it must to be expounded, and not as a Condition. Dyer: 10 Eliz. 317. Plowd. queres, 108. Moor. 312. 29 Eliz. Com. Banc. 1 Leon. Plac. 383. 2 Leon. 581. Poph. 6, 7. 1 Roll. Condition 411. and the same case is in Owen's Reports, 112. In case of a Devise, a Condition must be construed as a Limitation: 3 Cro. 388. There feems to be an Authority against me in Mary Portingtons case, 10 Rep. in a reason there given; but it is an accumulative reason, and does not come to the point adjudged. I shall insist upon Wellock & Hamond's case in Leon. it is reported likewise in Boraston's case, 3 Rep. and my Lord Coke says, that it both resolve a Quære in Dyer, 327. so that express words of Condition, may by construction in a Will, amount to no more then a Limitation. The fecond point is, whether he shall be excused for breach of this Condition, for want of notice? First, I shall consider it in respect of the perfon. Secondly, I respect of the grounds of notice in any cale. First, in respect of the person: now he may be considered in two capacities, as an Infant, and as a Devifer. Row his Infancy cannot excuse him: for the Condition was annexed to the Device express, because he was an Infant. Secondly, De is a Purchafoz. Row if an Infant purchase an Advowson, and the Incumbent dye, Laps shall incur, though he had notice of the death of the Incumbent: and there is the same reason in this case, where he is Devild. Thirdly, An Infant is bound by all Conditions in Det, though not by Conditions in Law. Com. 57. indeed 31 Aff. 17. is against it; but in Bro.

Condition, Plac. 114. that case is said to be no Law, and Bro. agreeth with Plowd. 375. Secondly, Confider him as Devilee: and then there will be less ground to excuse the want of notice. I take it to be a good disference betwirt Lands deviled to an Beir upon Condition, and Lands bevifed to a Stranger upon Condition. To the beir notice must be given, but not to a Stranger : for the heir is in by Descent, and a Title by Law cast upon him. And he may very well be supposed to take no notice of a Devise, because the Law takes no notice of a Devile to him. Row a Stranger, as he must needs take notice of the Effate given, to he may very well be obliged to take notice of the terms upon which it is giben. 4 Report. 83. As for the grounds and reasons of the Law when notice in any case is requisite, and when not; first, I take it for a rule, that every man is bound to take notice, when none is bound to give him notice : 1 H. 7. 5. 13 H. 7. 9. 5 Rep. Sir Henry Constable's case. 3 Leon. Burleigh's case in the Exchequer. 1 Cro.390. Rolls 856. Litt. Sect. 350. Dy fecond ground is, that where persons are equally parby and concerned, there needs no notice. Mich. 1649. Leviston's case. I Leon. 31. 7 Rep. 117. Mallorie's case. 14 H. 7. 21. The third consideration ariseth from the circumstances, and strict formality of all notice. Pou must not give notice of a Will by word of mouth, but you must leave a Copy of it, compared: 8 Rep. Fraunce's case. Row the Infant in Remainder is incapable of observing these circumstances; and they being both Strangers, are both to take notice at their peril. Row to answer Objections: one is, that the Condition is penal, and inflicts a forfeiture of an Estate, and that therefore notice ought to be given. I fap, this is rather a declamation, then an argument in Law. I will put a case, where he that is subject to a penalty, must give notice to preserve himself : Poph. 10. so that penalty or no penalty is not the bulinels; but privity or no privity guides the case. And Fraunce's case 8 Report, was ruled upon the privity, not upon the penalty. 2 Cro. 56. and a case adjudged in this Court betwirt Lee and Chamberlyne, feem against me; but they differ from ourg; and the 1 Cro. a case between Alford and the Commu-

nalty of London, is an Authority for me. Mr. Solicitor North pro Defendente. I will not speak much to that point, whether it be a Condition of a Limitation. I thall relie for that upon Mary Portington's case: that express words of Condition, cannot be construed to be a Limitation. Dyer 127. Row, if this be a Condition, then the heir regularly ought to enter: which he cannot do in this cafe, because a Remainder is here limited over. The Law does interpret Conditions according to the nature and circumstances of the thing, and not strictly always according to the Letter. I do not observe that in any case the Law suffers a man to incur a fogfeiture, where he hath not notice, or is not in the Law supposed to have notice. De cited 2 Cro. 144. Molineux & Molineux: and Fraunce's case 8 Report. He said it was not the intention of the party, that the Devilee hould be strip'd of his Estate, and be never the wifer. Saunders & Gerard's case is for me, of which I have a private rehe urged also the case of Curtis & Wolverton, Dyer, 354. and Penant's case 4 Report. It is objected, That they that are to have the benefit of the Effate, ought to take notice: I answer, the same Objection might be made in Fraunce's case. Another reason given to extule the not-giving of notice, is, that the Condition imports no more then Mature teacheth: but I answer, in case the Executor consent, it is no matter whether the Grand-mother consent of not. And for their Authorities, I shall rely upon 1 Cro. 391. and upon Fraunce's case for answering them. So he prayed Judgment for the Defen-Hales. All the difference betwirt this case and Dant. Fraunce's is, that in that case there is an Deir at Law. and not in this. Now the Chancery is to just, as to obferve the Civil and Canon Law, as to personal Legacies, but not as to Land.

Anonymus.

AN Action upon the case upon a promise to pay money three months after, upon a Bill of Exchange. The Defendant pleads, non Assumpti infra sex annos; urged, that as this promise is latd, he ought to have pleaded, that the cause of Action did not accrue within six years. Sympson. Non Assumpti infra sex annos, relates to the time of payment, as well as to the promise. Hales. That cannot be. Twisden. If I promise to do a thing upon request, and the promise were made seven years ago, and the request yesterday, I cannot plead the Statute; but if the request were six years ago, it must be pleaded specially, viz. that cause action is was above six years since.

Bradcat & Tower.

A IN Action was brought upon a Charter-party. And Hales in that case sato, that upon a penalty you need not make a demand, as in case of a nomnine poenæ; as if I bind my self to pay 20 l. on such a day, and in default thereof to pay 40 l. the 40 l. must be paid without any demand.

Hales. If a man cut and carry away Com at the same time, it is not felony, because it is but one Act: but if he cut it, and lay it by, and carry it away afterwards, it is felony.

Hales. If a Declaration be general, Quare clausum fregit, and both not expects what Close, there the Defendant may mention the Crespass at another day, and put the Plaintist to a new Assignment. But if he say, Quare clausum vocat. Dale fregit, &c. there the conclusion, Quæ est eadem transgressio, will not help.

Fitz gerard & Maskall.

Reason of a Judgment in the Kings Bench in Ireland: the General Etrop assigned. Offered, i. That the Eject. was brought de quatuor molendinis, without expressing whether they were Alind-mills of Watater-mills. Hales. That is well enough. The Presidents in the Register are so. Secondly, That it was of so many Acres Jampnor' & bruer', not expressing how many of each. Cur'. That hath always been held good. It was then objected, that the Record was not removed: upon which it was overed to stay.

Pemberton moved for a Prohibition to the Spiritual Court. for that they cited the Minister of Mary-bone, which is a Donative, to take a faculty of Preaching from the Bishop. Hales. If the Biffop go about to visit a Donative, this Court will grant a Probibition. But if all the pretence be, that it is a Chappel, and the Chaplain hired, and the Bishop send to him, that he must not Preach without Licence, it may be Twisden. Fitzherbert saith, if a Chaplain of the otherwise. Kings Free-Chappel keep a Concubine, the Bishop shall not Clifft, but the King. Hales. Inveed whether there be all Denaments requilite for a Church, the Bithop thall not enquire, noz thall be punith to not Repairing. Diginally free-Chappels were Colledges, and some did belong to the King, and some to private men. And in such a Chappel, he that was in, was entituled as Incumbent, and not a Stipendiarp. To hear Countel.

Doved by Stroud for a Prohibition to the Bishops Court of Exeter, because they proceeded to the Probate of a Will, that contained Devises of Lands as well as bequests of personal things. Hales. Their proving the Will signifies nothing as to the Land. Stroud urged Denton's case, and some other Authorities. Hales. The Will is entire, and we are not advised to grant a Prohibition in such case.

Hales. It is the course of the Exchequer in case of an Dutlawry, to prefer an Information in the nature of a Trover and Conversion, against him that bath the Goods of the party Dutlawed Parsons.

Parsons & Perns.

Women were Joyntenants in fee. One of them made a Charter of feofiment, and delivered the Dad to the feoffer, and faid to him, being within view of the Land, Go, enter, and take possession: but before any actual entry by the Feoffee, the feoffoz and feoffee entermarry. And the question was, whether of no this Marriage, coming between the delivery of the Deed and the feoffees Entry, had destroyed the operation of the Livery within the view? Polynxfen. It bath not: for the power and authority that the feoffee hath to enter, is coupled with an Interest, and not countermandable in Fact, and if to, not in Law. If I grant one of my Porfes in my Stable, nothing paffeth till Election, and pet the grant is not revocable: so till attornment nothing passeth, and yet the Deed is not revocable. If the Moman in our case, had married a Stranger, that would not have been a revocation : Perk. 29. I thati compare it to the case of 1 Cro. 284. Burdet versus :-- Row forthe interest gotten by the pushand by the Marriage: he hath no Effate in bis own right. If a man be feized in the right of his Wlife, and the Wife be attainted of Felony, the Lord shall enter and oust the Dusband; he gains nothing but a bare perception of profits till Inue had: after Mue had, he has an Estate for life. Where a man that hath title to enter, comes into possession, the Law both execute the Effate to him: 7 H. 7. 4. 2 R. 2. tit. Attornment. 28 Ed. 3.11. Bro. tit. Feoffment, 57. Moor, fol. 85. 3 Cro. 370. Hales faid to the other five, you will never get over the cafe of 38 Ed. 3. Dy Lord Coke to that case saith, that the Barriage without Attornment, is an execution of the grant: but that I bo not believe; for the attendance of the Tenant hall not be altered without his consent. The effectual part of the Feofiment is, Go, enter, and take possession. Twisden. Suppose there be two Momen leized, one of one Acre, and another of another Acre, and they make an exchange: and then one of them mars ries befoze Entry, mail that befeat the Erchange? Hales. That is the same case. So Judgment was given accordingly.

11.01

Zouch & Clare.

Homas Tenant for life, the Remainder to his first, second and third fon, the Remainder to William for life, and then to his first, second and third son: and the like Remainbers to Paul, Francis and Edward, with Remainders to the first, second and third son of every one of them. William, Paul, Francis and Edward, leny a fine to Thomas, Paul having Issue two Song at the time. Then Thomas made a Feoff-And it was urged by Mr. Leak, that the Remainders were hereby destroyed. Hales. Suppose A. be Tenant for life, the Remainder to B. for life, the Remainder to C. for life, the Remainder to a Contingent, and A. and B. do joyn in a fine, both not C's right of Entry preferbe the contingent Effates? If there had been in this case no Son boyn, the contingent Remainders had been destroyed; but there being a Son bom, it left in him a right of Entry, which supports the Remainders: and if we thould question that, we should question all, for that is the very balis of all Conveyances at this day. And Judgment was given accordingly.

Term. Pasch. 24 Car. II. 1672. in B. R.

Monke versus Morris & Clayton.

12 Action was brought by Monke against the Defendants, and Judgment was given for him. They brought a Writ of Erroz, and the Judgment was affirmed. Jones moved that the money might be brought into Court, the Plaintiff being become a Bankrupt. Winning'. This cale was adjudged in the Common-Pleas; viz. a man brought an Action of Debt upon a Bond, and had a Clerbict, and befoze the day in Bank, became a Bankrupt: it was moved, that that Debt was alligned over, and prayed to have the money brought into Court, but the Court refused it. Coleman. The have the very words for us in effect: for now it is all one as if Judgment had been given for the Assigners of the Commissioners. Twisden. Dow can we take notice that he is a Bankrupt? any Execution may be Copped at that rate, by alledging, that there is a Commission of Bankrupts out against the Plaintiff. If he be a Bankrupt, you must take out a special Scire facias, and try the matter, whether he be a Bankrupt or not. Which Jones said they would bo, and the Court granted.

Twisden. If a Pariner of Ship Carpenter run away, he lotes his wages due: which Hales granted.

Henry L. Peterborough verf. John L. Mordant.

Trial at Bar upon an Issue out of the Chancery, whe ther Henry Lord Peterborough had only an Estate for The Lord Peterborough's Life, or was leized in fee-tail. Counsel alledged that there was a settlement made by his father 9 Car. 1. whereby he had an Estate in Tail, which he never understood till within thefe three pears: but he had claimed hitherto under a Settlement made 16 Car. 1. And to prove a Settlement made 9 Car. 1. he produced a Witness, who laid, that he being to purchate an Effate from my Lord the father, one Mr. Nicholls, who was then of Countel to my Low, nave him a Copy of such a Deed, to thew what tie tie my Lord had. But being asked whether he did fee the bery Deeb, and compare it with that Copy, be answeren in the negative : whereupon the Court would not allow his Testimony to be a sufficient Evidence of the Deed: and so the active was for my Lord Mordant.

Cole & Forth.

Trial at Bar directed out of Thancery upon this Mue. whether Maft of no Matt? Hales. By protestation I try this cause, remembring the Statute of 4 Henr. 4. And the Statute was read, whereby it is Enaced, Chat no Judgment given in any of the Kings Courts, should be called in question, till it were reverst by Wirit of Erroz og Attaint. De faid this cause had been tried in London, and in a Writ of Erroz in Parliament the Judgment affamed; Now they go into the Chancery, and we must try the cause over again, and the same point. A Lease was made by Hilliard to Green in the year 1651. afterwards he deviseth the Reversion to Cole; and Forth gets an under-Lease from Green of the premisses, being a Brew-boule. Forth pulls it down, and builds the ground into Tenements. Hales. The question is, whether this be Wast of no? and if it be Wast at Late, it is to in Equity. To pull down a Poufe is Walf,

but if the Tenant build it up again before an Action brought, he may plead that specially. Twisden. I think the Books are pro and con: whether the twilding of a sew house be Mask or not. Hales. If you pull bown a Walt-mill, and build a Con-mill, that is Mask: Then the Counsel urged, that it could not be repaired without pulling it down: Twisden. That should have been pleaded specially. Hales. I hope the Chancery will not Repeal an Act of Parliament. What in the Hall, is Mask in the whole house. So the Jury gave a Account for the Plaintist, and gave him 1201. damages.

Term. Mich. 25 Car. II. 1673. in B. R.

A Action of Debt was brought upon a Bond in an inferiour Court; the Defendant cognovit actionem, & petit quod inquiratur per patriam de debito. This pleading came in question in the Kings Bench upon a writ of Erroz: but was maintain'd by the Custom of the place, where, &c. Hales said it was a good Custom; for perhaps the Defendant has paid all the Debt but 10 l. and this course prevents a Suit in Chancery. And it were well if it were established by Act of Parliament at the Common Law. Wild. That Custom is at Bristow.

Randall versus Jenkins. 24 Car. 2. Rot. 311.

Replevin. The Defendant made Conusance as Baylist to William Jenkins for a Rent-charge, granted out of Gavel-kind Lands to a man and his Peirs. The question was, whether this Rent should go to the Peir at Common Law, or should be partible amongst all the Sons. Hardres. It shall go to the eldest Son, as Peir at Law: for I conceive it is by reason of a Custom time out of mind used, that Lands in Kent are partible amongst the Hales. Lamb. Perambulat. of Kent 343. Now this being a thing newly created, it wants length of time to make it descendible by Custom. 9 H. 7. 24. A feosiment in Fee is made of Gavel-kind Lands upon Condition: the Condition shall go to the Peirs at Common Law, and not according to the descent of the Land. Co. Litt. 376. If a warranty be anner's to such Lands, it shall descend only upon the eldest Son. Row this Rent-charge, being a thing con-

contrary to common right, and de novo created, is not apportionable: Litt. Sect. 222. 224. it is not a part of the Land, for if a man levy a fine of the Land, it will not ertinguish his Rent, unless by agreement betwirt the parties: 4 Edw. 3. 32. Bro. tit. Customs 58. if there be a Custom in a particular place, concerning Dower, it will not extend to a Rent-charge: Fitz. Dower 58. Co. Litt. 12. Fitz. Avowry 207. 5 Edw. 4. 7. there is no occasion in this case, to make the Rent descendible to all: for the Land remains partible amongst the Pales, according to the Eustom. And why a Rent Mould go fo, to the prejudice of the Deir, I know not. 14 H. 88. it is faid, that a Rent is a different and diffina thing from the Land. Then the language of the Law speaks for general beirs, who shall not be disinherited by constructi The grand Objection is, whether the Rent hall not follow the nature of the Land? 27 H. 8. 4. Firzherb. faid, he knew four Authorities that it should: Fitz. Avowry 150. As for his first case, I say, that Rent amongst Parceners is of another nature than this: for that is diffreynable of Common right. As for the second, I say the rule of it holds only in cases of Proceedings and Trials; which is not applicable to his Tustom. Dis third case is, that if two Coparceners make a feofiment, rendging Rent, and one dies, the Rent shall not survive. (To this I find no answer given) Litt. Sed. 585. is further objected; where it is faid, that if Land be bevileable by Cuftom, a Rent out of luch Lands may be deviced by the same Custom: but Authorities clash in this point. De cited farther these books; viz. Lamb. Peramb. of Kent: and 14 H. 8. 7, 8. 21 H. 6. 11. Noy, Randall & Roberts case 51. Den. cont. I conceive this Bent thall descend to all the Brothers: for it is of the quality of the Land, and part of the Land: it is contained in the bowels of the Land, and is of the same nature with it: 22 Aff. 78. which I take to be a direct Authority as well as an instance. Co. Lit. 132. ibid 111. In some Wordughs a man might have devised his Land by Custom, and in those places he might have devised a Rent out of it. The Stat. de donis conditionalibus brought in a new Effate of Inheritance by way of entail: now this Effate Tail in Savelkind Lands hath been taken to befrend to all the Brothers; and the reason is, because it is part of the fee-timple, though created de novo: so Ases follow the nature of the Land. The cases that have ben cited, were

not the Opinion of the Court, but of them that argued. Lamb. 47. faith, that the Custom extends to Advocations, Commons, Rent-charges, as well as to Land. It is objected, that here must be a prescription: I answer, Gavel-kind Law is the Law of Kent, and is never pleaded but presumed. 7 Edw. 3. 38. Co. Litt. 175. 2 Edw. 4.18. & Co. Litt. 140. saith, the Customs of Kent are of common right, and if so, then our Rent-charge will go of common right to all the Brothers. Hales, Rainsford and Wyld were of Opinion, that the Rent ought to descend to all the Brothers, according to the descent of the Land: because the Rent is part of the profits of the Land, and issues out of the Land; and they gave Judgment accordingly.

A man covenanted to sand seized to the use of the Heirs of his body. Hales. The Deir and the Ancestog are correlates, and as one thing in the eye of the Law, and that is the reafon why a man shall not make his right Deir a Purchafoz, without putting the whole fee-simple out of himfelf. If the Fathers Effate turns to an Effate foglife, there will be no question. In the case of Bennet & Mitford, there did refult an Estate for life, to knit the Limitation to the original Effate. Here, 1. We are in the case of an Effate Tail; and the Judges use to go far in making such a Limitation good: then, 2. We are in the case of an Ale, which is construed as favourably as may be to comply with the intention of the party. This case is not as if he should have covenanted to stand leized to the use of the beirs of the body of J. D. there the Covenantoz would have had a fee-simple in the mean time: but the case is all one as if the Limitation had been to himself, and the beits of his own body: Vide the Earl of Bedford's case. Twisden. Tale must make it good, if we can. Cur' advisare vult.

Austin & Lippencott.

Special Clerdict. Francis the Father was Tenant for life, the Remainder in fee to Francis the Son; and by the Deed, by which this Estate was thus settled, 100 l.a year was appointed to be paid to Francis the Son during the fathers life. The Son releaseth to the Father all arrears of Rent, Annuities, Titles and Demands by virtue of that Indenture : and the question was, whether this Release passed the Inheritance as well as the Annuity? Polynxfen. I conceive this Release thall not pass any Estate in the Land: and my reason is, because there is no mention of the Land, noz of any Effate therein. The principal thing intended and erpreffed is the Annuity: then the Release concludes, to the day of the Release, which both manifest, that he did not intend to Release any thing that was not to come to him till after the beath of his kather. It is true, here is the word demand, but that will not doit: 3 Cro. 258. Then for the word Titles: by Plowd. 494. and 8 Rep. 153. it is where a man hath lawful cause to have that that another doth possels; sometimes it is taken in a larger fense, and then it doth include right. Upon confirmation of this Release I think it ought to be taken in the Arider lenle, and the intention of the party must guide the construction. For where there are general words in the beginning, and particular words afterwards, the particular do restrain the general: and so vice versa for enlargement: he cited Hen & Hanson's case, 15 Car.2. in this Court : where a Release of all demands would not Release a Rent-charge by the Opinion of the Judges against Twifden, for that reason; and because words in Deeds are to be taken according to common acceptation: he cited 2 Rolls 409. In our case, the general words of all Suits and Citles are limited and reftrained to the Annuity and Title of that, and thall not by a large confruction be extended to any thing elfe. Hales. How hath the Inheritance gone? Polynxfen. The Grandchild has that. Hales. I think a Release of all demands will not extinguish a . Rent : but if it were all demands out of Land, it were angther thing. It hath been held over and over again, that it does not extinguish and discharge a Covenant not broken. But what lay you to this Release of all Titles? for it appears in expels terms, that the Son did not only release the arrears of the Annuity, but the thing it self; and not only so, but all other Titles by virtue of that Deed: suppose the case had been but thus; the Father is Tenant so? life, the Remainder to the Son so. Life; the Son releaseth to his father all the Title that he has by vertue of that Deed: had not this passed the Sons Estate so? life? In the cases that you have cited, it is allowed that a Release of all Titles, will pass a right to Land. De had a Title to the Annuity, and a title to the Remainder: now he releaseth the Annuity, and all other Titles which he hath by that Deed, or otherwise howsoever: To hear Serjeant Maynard on the other side.

Wilson & Robinson.

Man debifeth all his Tenant-right Effate at Brickend, and all that my father and I took of Rowland Hobbs, &c. Levings. I conceive that these words pass only an Estate for life; for it is not mentioned what Estate he hath: 1 Cro. 447, 449. a Devise of all the rest of his Goods, Chattels, Leales, Eftates, Dottgages, Debts, ready money, ec. and the Court held, that no fee passed, and said it was a doubt. whether any Estate would pals in that cale, but what was for years; being coupled only with personal things. Trin. 1649. Rot. 153. Jerman & Johnson: Dne devised all his Effate, paying his Debts and Legacies; now his personal Estate came but to 20 l, and his Debts were 100 l. there indeed all his real Effate passed because of the payment of his Debts. And in our case, the following particulars are but a description of the Land, and contain no limitation of the Effate. If a man deviceth black Acre to one and the heirs of his body, and also deviseth white Acre to the same person, he hath but an Effate for life in white Acre, though he hath a Fee-simple in the other: for the word also is not so from as if it had been in the same manner. Moor 152. Yel. 209. Weston contra. I conceive an Estate of Inheritance both pals; for the word Estate comprehendeth all his Interest. When a man deviseth all his Estate, he leaves nothing

in himself: in that case of Jerman it was held, that all my Estate comprehends all my Title and Interest in the Land. If a man deviseth all his Inheritance, this carries the fee-simple of his Land: and the word, all his Estate, is as comprehensive as that. Hales & Wyld. By a Grant or Release of totum statum suum, the fee-simple will pass: if the words had been all my Tenant-right Lands, it had been otherwise: but the word Estate is more then so: if a man deviseth all his Copy-hold Estate, will not all his whole Interest pass? Adjornatur.

Norman & Foster.

M Action of Debt upon a Bond to perform Covenants in an Indenture of Leafe, one Covenant is for quiet enjoyment : and the Plaintiff affigns for breach, that a Stranger entred, but does not lay that he had Hales. Habens Titulum at that time, would have bone your business. Dy Lord Dyer's case is, that another entred claiming an Interest: but that is not enough; for he may claim under the Lessee himself. De mentioned the cases in Moor 861. & Hob. 34. Tistale & Essex. If the Covenant had been to save him harmless against all lawful and unlawful Titles, pet it must appear, that he that entred, did not claim under the Leffee himfelf. Hales. If I Covenant that I have a lawful right to grant, and that you shall enjoy notwithstanding any claiming under me; thefe are two feveral Covenants, and the first is general, and not qualified by the fecond. And so said Wyld: and that one Covenant went to the Title, and the other to the possession: Dyer, 328. An Assumpsie to enjoy fine interruptione alicujus, that is, whether by Title or by Tort, a quiet possession being to be intended to be the thief cause of the Contract. 3 Leon. 43. 2 Cro. 425, 3154 444. Adjornatur.

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Angell condicted of Barretry, produced a Pardon, which was of all Treatons, Hurders, Felonies, and all Pernalties, Forfeitures and Offences. The Court faid the words all Offences, will pardon all that is not capital.

Blackburn & Graves.

A Copy-holder surrenders to the use of several persons for years successive, the Remainder in Fee to J.S. Wyld. An admittance of a particular Tenant is an admittance of all the Remainders to all purposes, but only the Lords fine: and if the Custom be, that the fine paid by the first Tenant shall go to all the Remainders, then the admittance of the first man is to all intents and purposes an admittance of all that come after. In this case the possession of the Lesse sor years is the possession of the Remainderman. In one Baker & Dereham's case, there was a surrender to the use of a man and his beits of Copy-hold Land, that discended according to the Custom of Borough-English: the surrenderee dyed before admittance; and the Opinion of the Court was, that the right would discend to the youngest, according to the Custom.

Apon a cate moved, Hales said, That if a Tenant in Tommon bying a personal Action without his fellow soyning in the Suit, the Defendant ought to take advantage of it in abatement: but if he plead Not-guilty it shall be good, but then he shall recover bamages only soz a mosety. If a Tenant in Common seal a Lease of Ejectment, he shall recover but a mosety.

A Justice of Peace committed a Bzewer for not paying the duty of Excise; the Bzewer was brought into Court by Habeas Corpus. Sympson. It ought to appear that he was

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was a common Brewer. Hales. The Statute doth probibit the bringing of a Certiorari, but not a Habeas Corpus. And want of averment of a matter of fact, may be amended in a Return in Court: and if it be not true, at their peril be it. So it was mended.

Poney owing upon a Judgment given in the Kings Court cannot be attached.

Term.

Term. Hill. 25 & 26 Car. II. 1673. in B.R.

Baker & Bulftrode.

and execute a Release to the Plaintiff. The Defendant demurs, because the Plaintiff did not alledge in his Declaration a tender of a Release. It was urged, that the Condition was not, to make, but only to Seal and Execute, ec. But per Curiam, he is bound to do it without a tender. And the word Execute, or the word Seal, comprehends the making. And Lamb's case was cited.

Warren & Prideaux.

Trin. 24 Car. 2. Rot. 1472.

A Distress and Avowy for Toll. The prescription was for Toll, in consideration of maintaining the key, and keeping a Bushel to measure Salt; viz. That in consideration thereof he and those, &c. have had time out of mind, &c. a Bushell of Salt of every Ship that comes laden with Salt into Slipper-point: for the Avowant it was alsedged, that the maintaining of the key is for publick good: Co. Magn. Cart. 222. Rolls 265. Its true, it is not alledged, that they did actually use the Weights and Measures. I Leon. 231. but it being alledged that the Ship came within Slipper-point, it is enough to charge the Plaintif with the payment. As for the Distress taken, which is part of the Ships lading, viz. Salt; it is objected, that it cannot be distrained, because it is part

of the thing from which the duty arifeth: but I answer, that this is not like to a Diffress upon Land, not to be judged of according to the rules allowed in cales of luch Diffrefles. There were cited on this side 21 H. 7. 1. 3 Cro. 710. Smith & Shepheard: Dyer 352. Courtney contra. I conceive this prescription ought to have some consideration, and to be grounded on a meritogious cause, to bind a Subject. The keeping of the Bushell is no meritozious cause, because it is prelumed, that the party bath the use of it himself. Hales, The prescription is not for a Port but a Wharfe. If any man will prescribe for a Toll upon the Sea, he must alledge a good con-sideration; because by Magna Charta, and other Statutes, every one hath liberty to go and come upon the Sea without Wyld. This Custom or Prescription is laid, impediment. to have a Bushell of Salt of every Ship that comes within the Slipper-point; if a Ship be driven in by stress of weather, and goes out again the first opportunity that presents, shall that Ship pay? Hales. If he had faid, that he had a Port, and was bound to maintain that Port, and that he and all those whose Effate he had, ec. that might have been a good Prescription; but in this case there must be a special inducement and compensation to the Subject by reason of those Statutes by which all Werchants and others, have liberty to come in and go out: They inclind that the Prescription was not good.

Anonymus.

A Trial at Bar concerning the River of Wall-fleet; the question was, whether had not the right of Fishing there, exclusive of all others. Hales. In case of a private River, the Loyds having the Soil is a good evidence to prove that he hath the right of Fishing; and it puts the proof upon them that claim liberam piscariam. But in case of a River that slows and re-slows, and is an Arm of the Sea, there prima facie it is common to all; and if any will appropriate a priviledge to himself, the proof syeth on his side; for in case of an Action of Trespass brought for fishing there, it is prima facie a good justification to say, that the locus in quo is brachium maris, in quo unusquisque subjectus Domini Regis

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habet & habere debet liberam piscariam. In the Severne there are particular restraints, as Gurgites, &c. but the Soil both belong to the Loos on either side: and a special sox of fishing belongs to them likewise; but the common sox of fishing is common to all. The Soil of the River of Thames is in the King: and the Loos Mayor is Conservator of the River; and it is common to all fisher-men: and therefore there is no such contradiction between the Soil being in one, and yet the River common sox all fishers, ec.

Sedgewick & Gofton.

Hales said, That a Writ of Erroz in Parliament may be retozned ad prox. Parliament. such a day; but if a particular day be not mentioned, then it is naught; and although there be a particular day expected, yet if that day be at two oz their Terms distance, the Court will adjudge it to be foz delay; and it shall be no Supersedeas. And he said he had looked into the Books upon the point. In the Register he said, there is a Scire sac, ad prox. Parliament, but not a Writ of Erroz.

Term. Pasch. 26 Car. II. 1674. in B. R.

Fountain & Coke.

Trial at Bar. Hales. An Executor may be a witness in a cause concerning the Estate, if he have not the Surplusage given him by the Will: and so have known it adjudged. If a Lessee sor years be made Tenant to the Præcipe sor sussering a common Recovery; that doth not extinguish his term, because it was in him sor another purpose: which the whole Court agreed.

Jacob Aboab

Debt upon a Bond was brought against him by the name of Jacob: and he pleaded, that he was called and known by the name of Jacob, and not Jacob: but it was over-ruled.

Sir John Thorowgood's Cafe.

To was moved to quash an Invicement, because it ran in detrimentum omnium inhabitantium, &c. Rolls 2 part 83. Wyld. I have known it ruled naught for that cause. So quashed.

Benson versus Hodson.

Writ of Erroz of a Judgment in the County Palatine of Lancafter in Replevin : The Defendant makes Co. nulance as Bayliff to Ann Mosely: The Lands were the Lands of Rowland Mosely, and he covenanted to levy a fine of them, to the use of himself and the ipsics males of his body, the remainder in Tail to several others, the remainder to his own right heirs. Provided, that if there hall be a failer of Mue Male of his body, and Dame Elizabeth be bead, and Ann Mosely be married, og of the age of 21 years, then she shall have 200 l. per annum for ten years: Then Rowland dies, leaving Istue Sir Edward Mosely, Sir Edward makes a Lease for 1000 years, then levies a Fine, and luffers a Recovery; Then dies without Mue Bale: And the Contingents did all The question is, whether this Rent-charge of 200 l. per annum be barred by the fine and Recovery, and thall not operate upon the Leafe? Levings. I conceive the fine is not well pleaded, for nothing is faid of the Kings Silver, and if that be not paid, it is void: Then they have pleaded a Common Recovery, but not the Execution of it by Entry. Dow I conceive the Common Recovery doth destroy the Estate Tail, but not the Rent. The reason why a common Recovery is a Bar, is because of the intended recompence. Row that is a finitious thing: 9 Rep. Beamonts case. I Cro. Stone and Newman, Cuppledicks case. Dow this Rent is a meet possibility, and bath no relation to the Estate of the Land. Then again, when the Recovery was luffered, the Rent was not in being: Now a Recovery will never bar but where the Effate is dependant upon it, either in Reversion or Remain-For that case of Moor pl. 201. I conceive he is barred, because the Reversion is barred by the fine. 3 Cro. 727. 792. White and Gerilhe's case, the same case 2 And. 190. Noy p. 9. Another reason is, because the Rent remains in the same plight, notwithstanding the fine. Another reason is, it was a meer possibility at the time of the Fine and Recovery. Pell In our cafe is no Effate in effe and Brownes case is for me. to be barred. Then this Effate is granted out of the Effate of the Feoffets, As in Whitlocks case 8 Rep. 71. the Estates for years, which there is a power to make, thall be faid to precede

mecede all the Limitations. There is no other way for fecuring volunger Childrens Portions by the same Deto, but it may be bone by another Died, as in Goodyer and Clarkes case. Mr. Finch contra. I conceive the Rent is batted upon the reason of Capells case. They say not. (1) Because it both only charge the Remainder. (2) The intended recompence both not go to it. (3) This Leafe for 1000 years both precede the fine. The Law will never invert the operation of a Conbeyance, but ut res magis valeat, Bredon's case, Then for the intended recompence, that cannot be the reason of barring a Remainder, for the Effate Tail was barred befoze. 3 Leon. 157. But Moor fol. 73. faith, it is the favour the Law hath for Recoveries: And till the Reversion takes place in possession, the Rent cannot arise out of the Reversion, noz so some as this Leafe is in being. Hales. You make two great points, (1) Whether the Bent be barred by the Common Recovery? (2) Whether the Rent-charge thall arise out of the Lease for years? This is plain; if Tenant in Tail grant a Rentcharge, and luffer a Common Recovery, the Rent-charge will not be avoided; So that if Tenant in Cail grant a Rent, a Recovery will not bat that, though it both a Reversion; but the reason of these cases is, because the Estate of him that luffers the Recovery, is charged with the Rent. Therefore if there be a Limitation of a Afe upon Condition, and Cestui que use suffers a Recovery that will not vestroy the Condition, the Estate being charged with it, for the Recoveror can have the Ghate only as he that luffered the Recovery had it; And therefore there is an Act of Parliament to enable Recoverors to diffrein without Attornment. There fore to long as any one comes in by that Recovery, be comes in in continuance of the Blate Call, and coming in fo, he is lyable to all the charges of Tenant in Tall. Row what is the reason who Tenant in Tail, suffering a Common Recovery, a Rent by him in Remainder thall be barred? The reason is, because the Recoveroz comes in in the continu ance of that Chate that is not Subject to the Bent, but is above all those tharges; now no recompence can come to such a Rent. And therefore there is another reason why a Common Recovery will bary at Common Law upon an Estate Tail, which was a fir-simple conditional, a Remainver could not be limited over; because but a possibility: but now comes that Statute De donis conditionalibus, and makes

it an effate tail, and a Common recovery is an inherent priviledge in the Estate that was never taken away by that Statute De donis, the Law takes it as a conveiance excepted out of the Statute, as if he were absolutely seised in fee, and this is by construction of Law; It is true, there can be no recompence to bim that hath but a poffibilitie. But the bulinels of recompence is not material, as to this charge; And the reason of Whites case and other cases put explain this. Now what difference between this and Capels case? Say they, there the charge both arise subsequent, but here the charge both arife precedent; why I fay the charge both arife precedent to the Remainder, but subsequent to the Effate tail, for it is not to take effect till the Effate tail be determined. It was doubted in the Queens time, whether a Remainder for years was barred, but it hath been otherwise practised ever since and there is no colour against Now you do agree that the Remainder to the right Deirs of one living shall be varred, for the Estate is certain though the Person be uncertain; So long as the Rent both not come within the compals and limitation of the Estate tail the Rent is extinct and killed, there is nothing to keep life in it: But whether both not the Leafe for years preferve it? Peretofore it was a question among poung men, Whether if Tenant in Tail granted a Rent Charge for Life, then makes a Leafe for three Lives; In this case though the Rent before would have dyed with Tenant in Tail, pet this Bent will continue now during the three Lives, which it will. And it hath been questioned, if he had made a Leafe for years instead of the Leafe for lives if that would have supported the Rent? Row in our case if the Leafe for years were chargeable the Rent would arife out of that; But if this Rent thould continue then moff mens Effates in England would be thaken. Leafe for years both not preferve the Rent, but the Common Recovery both bar it: for Pell & Brownes case; in that Case the Recovery could not barr the possibility, for he was not Tenant in Tail that Did luffer the Recovery, but he had only a fee simple determinable, and the contingent Remainder not Depend upon an Effate Cail, nay Did not Depend by way of Remainder, but by way of Contingency; It is true, Juffice Dodridge did hold otherwise, but the rest of Judges gave Judgment against him upon very good reason.

I never heard that case cited, but it was arumbled at. Hales. But to pour knowledge and mine, they always gave Judgment accordingly. A man made a gift in Cail beterminable upon his non-payment of 1000 l. the Remainder over in Tail to B. with other Remainders, Tenant in Tail before the day of payment of the 1000 l. luffers a common Recovery, and both not pay the 1000 l. yet because he was Cenant in Tail when he suffered the Recovery, by that he had barred all, and had an Effate in fee by that Recovery. At a day after Hales faid, the Rent was granted before the Leafe for pears, and is not to take effect till the Effate Tail be spent, and a common Recovery bars it: If there be Tenant in Tail, referving Rent, a common Recovery will not bar it; so if a Condition be for payment of Rent, it will not bar it: But if a Condition be for doing a collateral thing, it is a bar. And to if Tenant in Tail be with a Limitation to long as such a Tree shall stand, a common Recovery will bar that Limitation.

Lampiere versus Mereday.

And Audita Querela was brought before Judgment entred, which they could not do: 9 H. 5. 1. which the Court agreed; Whereupon Countel said, it was impossible so, them to bring an Audita Querela before they were taken in Execution; so, the Plaintiss will get Judgment signed, and take out Execution on a suddain, and behind the Defendants back. Thereupon the Court ordered the Possea to be brought in, so, the Defendant to see is Execution were signed. And at a day after Hales said, If an Audita Querela was thought after the day in bank, though the Judgment was not entred up, yet the Court would make them enter up the Judgment, as of that day, So that they shall not plead Nul ciel Record.

Wyld (ato, a Sheriffs bond for ease and sabour was vost at Common Law, and so it was declared in Sir John Lepthalls case.

Twifden

Twisden upon opening of a Record by Mr. Den sato, It was already adjudged in this Court, that a Rent issuing out of Savelkind Land, is of the nature of the Land, and shall descend as the Land doth.

An Action of Debt upon a Bond. Sympson moved in Arrest of Judgment. The Bond was dated in March, and the Condition was for payment, super vicessimum octavum diem Martii prox's sequentem. It was sequentem which refers to the day which shall be understood of the month next year. If it had been sequentis, then it had referred to March, and then it had been payable the next year. But the Court was of Opinion, that it should be understood the currant month. Sympson cited a case wherein he said it had been so held. Read versus Adington.

Hales. Formerly, if Execution was gone before a Writ of Erroz delivered or thewed to the party, it was not to be a Su-Wyld. De must not keep the Writ in his pocket, and think that will ferve. At another day Hales faid, it shall not be a Supersedeas, unless thewed to the party, and he must not foreflow his time of having it allowed, for if it be not allowed by the Court within four days, it is no Supersedeas. Hales. A Writ of Erroz taken out, if it be not thewn to the Clerk of the other five, not allowed by the Court, it is no Supersedeas to the Execution: And that if a Wirit of Erroz be fued bearing Teste before the Judgment be given, if the Judgment be given before the Retorn, it is good to remove it, (though at first he said it was so in respect of a Certiorari, but not of a Writ of Erroz.) And he said that Judgment, when ever it is entred, bath relation to the day in bank, viz. the first day of the Term: So that a writ of Erroz retozz able after, will remove the Record when ever the Judgment is entred.

Apon a motion concerning the amending of Leather-Lane. Hales. If you plead Mot-guilty, it goes to the Repair of not Repair; but if you will discharge your self, you must do it by prescription, of ratione tenura, and say that such an one ratione tenura, of such part of the Parish, bath always used time out of mind, &c.

Anony-

Anonymus.

AN Action of Debt upon a Bond: the Condition, Whereas one Bardue did give by his Will so much, if he should pay it such a day, ac. The Defendant pleads bene & verum est, he did give him so much by his Will and Tessament; but he revoked that, and made another last Will. The Court said, he was essopped to plead so. Hales. It doth not appear when the Bond was made, and it shall be intended to be made after the parties death. Judgment pro Querente.

Deereing versus Farrington.

M Action of Covenant, declaring upon a Deed by which the Defendant assignavit & transposuit all the money that should be allowed by any Dider of a Forreign State to come to him in lieu of his thare in a Ship. Tompson moved that an Action of Covenant would not lye, for it was neither an erpects not implied Covenant: 1 Leon. 179. Hales. Pour should rather have applyed your self to this; viz. whether it would not be a good Covenant against the party, as, If a man doth demile, that is an implied Covenant; but if there be a particular expects Covenant, that he thall quietly enjoy against all claiming under him, that retrains the general impiped Covenant; But it is a good Covenant against the party himself. If I will make a Lease for years, referving Rent to a Stranger, an Action of Covenant will lye by the party for to pay the Rent to the Stranger. Then it was faid, it was an Affignment for maintenance. Hales. That ought to have been averred. Then it was further faid, that an Affign = ment transferring, when it cannot transfer, fignifies nothing. Hales. But it is a Covenant, and then it is all one as if he had covenanted that he sould have all the money that he sould recover for his loss in such a Ship. Twifd. feemed to doubt. But Judgment.

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Lord Mordant versus Earl of Peterborough.

Rial at Bar, the question was, Whether the Earl of Peterborough was Tenant for life only of the Mannoz of Mayden: The Defendant did not appear, the Plaintiff thereupon defired to examine his Witnesses, that so he might preferve their Evidence. Twifd. When they do not appear, what good will that do you? for they will fay, you fet up a man of straw, and pull him down again. There was a fozmer Deed of entail, with a power of revocation in it, and after the Deed exhibited was made, whereby the Effate was otherwise settled, and there was a Joynture to the present Lady, and done by persons of great Learning in the Law: The Revocation was to be by Deed under my Lozds Hand and Seal in the presence of the Witnesses: Now the quefion was, whether this fecond Deed was a revocation in Law, and an Execution of that power? And the Court told the Councel, they should find it specially if they would; but they refused. Hales. In 16 Car. Snape and Sturts case, If there be a power of revocation, and a Leafe for years is made, it both suspend quoad the term, but after it is good. Then it hath been questioned farmerly if there be such a power. and the person makes a Lease and Release, whether it was a Revocation. But Mall we conceive the learned Counfel in this case would have ventured upon an implicit revocation, and not have made an expels revocation? So that you must be non-fuit, or find it specially. But the issue being, If he were only Tenant for life, he faid he must go back to the Chancery to amend it, for by the Deto produced, he hath an Effate for life, and the Reversion in Fee.

Burgis versus Burgis. In Chancery.

A Jan having a long Lease, settled it in Trust upon himself soziste, the Remainder to his Wise for life, the Remainder to the Kemainder to the second Son, and so to the tenth Son; And if they should

thould have no Son or Sons then the Remainder, to fuch Daughter and Daughters of their bodies, ec. The man and his wife vied, and left only a Daughter, who preferred her Bill against the Trustees for the executing of this Remainder to her; The question is, whether this Remainder be a good Remainder, of whether it be void? And the Lord Keeper Finch held it was a void Remainder, because it doth depend upon fo many, and fuch remote Contingencies, for otherwife it would be a perpetuity. And he said, he would allow one Contingency to be good, viz. that to the first Son, though the first Son was not in esse at the time of his decease. he said, he did deny my Lord Cokes Opinion in Leon. Lovells case, which saith, that in case of a Lease settled to one and the heirs males of his body, when he dies the Estate is determined; for he faid it thall go to his Executors. And he faid there was the same case with this in this Court, Backhurst versus Bellingham. And he said, that the Common Law did complain, that this Court did encroach upon them, whereas they are beholding to this Court for their rules in Equity, as, Formerly when Eccletiastical persons made Leases, a misnofmer would avoid them, but Elimere in his time would not withstanding the missosmer make them good. And he cited a case in Dyer, and Matthew Mannings case, Leon. Lovell and Lampetts case, and Child and Bailies case.

Another cale in Chancery. One mortgaged Lands, then confest a Judgment, and died, The Mortgagée buys of the heir the Equity of Redemption for 2001. The Bill was preferred by the Creditor by Judgment against the Mortgagée and heir, either to be let in by paying the Mortgage money, or else that the 2001. received by the heir, might be Asets; And the Court said, that the Mortgagees Estate should not be stirred; But it was left by my Lord to be made a case, whether the two hundred pounds should be assets in the hands of the heir.

Trial at Bar; An Action of Debt brought against Mosedell for the escape of one Reynolds; The Plaintist fair, he could prove that he was at London three long clacations. Twifd. It is hard to put three Escapes upon the Warthal, for he may be provided only for one, and he cannot give in Evidence a Fresh pursuit, but it must be pleaded. Hales. I always let them give in evidence a Fresh suit upon a Nil de-And Wild fair, it was generally done. So they gave evidence of an Habeas corp. ad test, and that the Prisoner went down too long before hand, and stayed too long after the Assizes were done at Wells in Somerset-shire, and that he went back threescore miles beyond Wells before he retorned again for London. Hales. If an Habeas Corpus be granted to bying a person into Court, and the Sheriff let him go into the Country, it is an escape. And though he be not bound to bying him the vicest way, because he may be rescued, vet he ought not to carry him round about a great way for the accommodation of the party; if he both it is an Escape; but by this Evidence you let him go back threescore miles, to which there can be no answer. An Habeas Corpus retomable immediate, is not firt to an hour, but to a convenient They auswered, that he went back to carry back some Counsel, here is an escape of one of the parties, who vies before the Action brought, whereby the whole charge is furvived to the other before the Action brought; and whether this thall purge the Escape is the question, or how far it hall purge it? Wild. Before you brought your Acion the Debt is gone, as to the Escape. Hales. We are made the Engines of doing all the mischief if this thall go unpunished, being by colour of an Habeas Corpus. So the Jury brought in a Clerdic for the Plaintiff, who declared in Debt for 6200 l.

Greene versus Proude.

Trial at Bar; The question, whether a Will or no Mill? The Plaintiff produced a Deed indented, made between two parties, the Man and his Son : and the father did agree to give the Son so much, and the Son did agree to pay fuch and fuch Debts and Sums of money: And there were some particular expressions refembling the form of a Mill; as, that he was fick of body, and did give all his Goods and Chattels, ac. but the Wiriting was both Sealed and delivered as a Deed; And they gave evidence, that he intended it for his last Will; which, the Court said, was a good proof of his Will. Then the Defendant setting up an Entail, the Plaintiff exhibited an Exemplification of a Recovery in the Marquels of Winchesters Court in ancient demesne; The other five objected, that they did not prove it a true Co-But because it was ancient, the Court said they should not be fo firid upon the Evidence of it, for the other five faid, the Court Rolls were burned in Baseing-house in the time of the Mars. Hales. I remember a cafe, where one had gotten à presentation to the Parsonage of Gosnall in Lincoln-shire, and brought a Quare Impedit, and the Defendant pleaded an Appropriation; there was no Licence of Appropriation production ced, but because it was ancient, the Court would intend it. Then they objected, that they ought to prove seisin in the Tenant to the Pracipe. Hales. It being an ancient Recobery, we will not put them to prove that. He said the Wayor of Briftol had offered in evidence an Exemplification of a Becovery under the Town Seal, of Doules in Bristol, the Records being burned, and that Exemplification was allowed for Ebi-Hales. If Tenant in Tail accept a fine come ceo, &c. this doth not not alter his Estate: If Tenant for life accept of a fine Sur commance, &c. be both forfeit his Effate, but it both not after the Effate for life. Objection, The Recovery is of Land in Kingscleare, whereas the Land claimed is in a particular dille called ---- And the dills are feveral, and there are diffing Courts in every Aille. Hales. There are feveral Tythings of Dale, Sale and Downe, there is a Tythingman in every particular place; but the Constable of Dale goes through all; these may go for several Aills, or one Aill; There may be a Hannoz that hath several little Hannozs within it, wherein are held several Courts soz the ease of the Tenants, but all but one Hannoz; And a Writ of Right close is, Quod plenam rectam, &c. and runs to the Baylist of the Hannoz, and may extend to the Precinc of the whole Hannoz: as the Hannoz of Barton hath several little Hannozs under it, yet all within the Hannoz. Hales. Where there is a Writ of Right close in ancient demesse, it is not like a demand to a Sherist here, where he hath his direction soz so many Acres. Maynard. But then he must demand it in the particular Wille where it is. Hales. It a Præcipe quod reddat he of Land in a Partish where it must be in a Wille, there may be exception to the Writ, but if he recovers it is good, soz now the time is past; And so where it is infra manerium, if he recovers it is good.

Browne versus ----

A Wation brought in Canterbury Town; The Defendant removes it by Habeas Corpus: Then the Plaintist declares here. It was moved that it might be tried in some other Tounty, because the Judges came there so seldom. Court. Let them shew cause why they should not consent; and if they will plead Nil debet, the Plaintist will be willing to let them give any thing in Evidence. And Simpson said, it was the Opinion of all the Judges, that upon Nil debet pleaded Entry and Suspension may be given in Evidence, which the Court vid not deny: So the Court ordered the other side to shew cause why they should not consent.

One Hillyard an Attorney sued for his Fees in this Court, in the Court at Bristol: But the Court said, an Attorney ought not to wave this Court.

A motion was made by Sir William Jones for the Lord Dayor Starling, and the Recorder Howell: One Bushell See Bushel's brought an Action against them for Falle Imprisonment. in Vanghan's And because the plea was long, he prayed he might have Reports. time to plead. Hales. I speak my mind plainly, that an Action will not lye; for a Certiorari and an Habeas Corpus, whereby the body and proceedings are removed his ther, are in the nature of a Writ of Erroz; And in cale of an erroneous Judgmene given by a Judge, which is revers by a writ of Erroz, shall the party have an Action of Falle Impilonment against the Judge? Do, not against the Officer neither: The Habeas Corpus and Wirit of Erroz, though it doth make void the Judgment, it both not make the awarding of the Process boid to that purpole; and the matter was done in a course of Justice: They will have but a cold business of it. An Habeas Corpus and Certiorari is a Whith of right, the highest Writ the party can bying. So day was given to shew caufe.

Lord Tenham versus Mullins.

A Trial at Bar about a fraudulent Deed. Hales. There are this things to be considered, Fraud, Consideration, and Bona side. Now the Bona side is opposite to Fraud. I remember a case in Twine's case; If the Son be dissolute, and the father with advice of friends both settle things, so that he shall not spend all, though here be not a consideration of money, yet it is no fraudulent Deed; and a Deed may be voluntary, and yet not fraudulent, otherwise most of the Settlements in England would be avoided; and so said Twisden.

Blackburne versus Graves.

Rober for 100 Loads of Alood; Not-guilty pleaded; A special Aerdia, that the Lands are Copyhold Lands, and furrendzed to the use of one for eleven years, the Remainder for five years to the Daughter, the Remainder to the right heirs of the Tenant for eleven years; The eleven years erpire, the Daughter is admitted, the fibe years expire; and there being a Son and Daughter by one Venter, and a Son by another Venter, the Son of the first Venter dies befoze admittance, and the Daughter of the first Venter and her bulband bying Trover for cutting down of Trees; And the que-Mion was, if the admittance of Tenant for years, was the admittance of the Son in Remainder? Levings. I conceive it is; and then the Son is leized, and the Daughter of the whole blood is his heir; and hecited 4 Rep. 23. 3 Cro 503. Bunny's case. Wyld. The Estate is bound by the Surrender. Hales. If a man both furrender to the use of John Styles, till admitted there is no Effate in him, but remains in the Surrenderoz; but he hath a right to have an admittance; If a surrender be to J. S. and his heirs, his heir is in without admittance if J.S. dies. About this hath indeed been divertity of Opinion, but the better Opinion hath been according to the Lord Coke's Opinion. I do not fee any inconvenience, why the admission of Tenant for life or years, should not be the admittance of all in Remainder, for fines are to be paid, notwithstanding by the particular Remainders; and so the Books say it shall be no periudice to the Lood. Twisd. I think it is strong, that the admission of Lestee for years, is the admission of him in Remainder; for as in a case of possessio fratris the Estate is bound, so that the Sister shall be heir; so here the Effate is bound, and goes to him in Remainder. Hales. I shall not prejudice the Lord; for if a fine be affested for the whole Estate, there is an end of the bufinels; but if a fine be affested only for a particular Estate, the Lord ought to have another. If a surrender be to the use of A. fog life, the Remainder to his eldeft Son, ec. of to the use of A. and his heirs, and then A. dies,

dies, the Chate is in the Son without admittance, whether he takes by purchase or descent. And Judgment was given accordingly.

Draper versus Bridwell. Rot. 320.

A LL the Court held, that an Action of Debt would lye upon a Judgment after a Wirit of Erroz brought.

Twisden. They in the Spiritual Court will give Sentence for Tythes for rakings, though they be never so unvoluntarily left, which our Law will not allow of.

Wyld fair, that Actions personal transitory, though the party both live in Chester, yet they may be brought in the Kings Courts.

Hales. Shew a President where a man can wage his Law iti an Action brought upon a Prescription for a duty; as, in an Action of Debt for Toll by Prescription, you cannot wage your Law.

Pybus versus Mitford. Postea.

The Chief Justice velivered his Opinion, Wyld, Rainsford and Twisden having sirst velivered theirs. Hales. I think Judgment ought to be given for the Defendant, whether the Son take by vescent or purchase. I shall divide the case, (1) Whether the Son doth take by descent? (2) Admitting he doth not, whether he can take by purchase? We must make a great dissevence between Conveyances of Estates by way of use, and at Common Law; A man cannot convey to himself an Estate by a Conveyance at Common Law, but by way of Use he may. But now in our case here doth retorn by operation of Law an Estate to Michael sor his life, which is

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conjoyned with the Limitation to his heirs. The reason is, because a Limitation to the heirs of his body, is in effect to himself: this is perfectly according to the intention of the parties. Objection. The use being never out of Michael, he hath the old use, and so it must be a Contingent use to the heirs of his body. But, I say, we are not here to raise a new Estate in the Covenantoz, but to qualifie the Effate in fee in himfelf: for the old Estate is to be made an Estate for life, to serve the Limitation. Further Objection, It shall be the old Estate in Fee, as, if a man deviseth his Lands to his heirs, the heir is in of the old Estate. But, I answer, if he qualifie the Effate, the Son must take it fo, as, in Hut-So in this case is a new qualification. Roll 789. 15 Jac. If a man makes a feofiment to the use of the heirs of the body of the Feoffoz, the Feoffoz hath an Effate Cail in bim, Pannell versus Fenne, Moor 349. Englefield and Englefield. (2) I conceive, if it were not possible to take by bescent, this would be a Contingent use to the heirs of the body. Objection, It is limited to the heir when no heir in being; Why, I say it would have come to the heir at Common Law, if no express Limitation had been, and it cannot be intended that he did mean an heir at Common Law, because he did specially limit it. Fitz. tit. Entayle 23.

An Affile for the Serjeant at Mace's place in the Poule of Commons. The Plaintiff had his Patent read; The Court asked if they could prove Seisin; They answered, that they had recovered in an Acion upon the case for the mean profits, and had Execution. Court. For ought we know, that will amount to a seisin. Twisden. Apon your grant since you could not get seisin, you should have gone into Chancery, and they would have compelled him to give you seisin. Hales. A man may bring an Action upon the case for the profits of an Office, though he never had seisin; So the Record was read of his Recovery in an Action upon the case for the profits. Hales. This is but a seisin in Law, not a seisin in Fact; The Counsel for the Plaintist much urged, that the Recovery and Execution had of the profits, was a sufficient seisin to entitle them to an Assise. It was objected,

that the Plaintiss was never invested into the Office. Hales said, That an investiture did not make an Officer when he is created by Patent, as this is; but he is an Officer presently. But if he were created an Herald at Arms (as in Segars case) he must be invested before he can be an Officer; a person is an Officer before he is swozn. Hales. You are the Pernor of the prosits, and they have recovered them; is not this a Seisin against you? They shall find it specially, but they chose rather to be Non-suit, because of the delay by a special Aerbic. And the Court told them, they could not withdraw a Juroz in an Assis, for then the Assis would be depending. The Roll of the Action sur le case suit 19 Car. 2. Mich. Rot. 557.

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Term.

Term. Trin. 15 Car. II. 1663.

Judge Hide's Argument in the Exchequer-Chamber.

Manby versus Scott.

Feme Covert departs from her Dusband against his

Assumpsit vers Baron & Feme pur Wares vend & deliver al Feme.

will, and continues absent from him divers years; afterwards the wife delires to cohabit with her hulband again, but the husband refuseth to admit her; and from that time the wife lives separate from him; during this separation, the husband forbids a Tradesman of London to trust his Wife with any Goods of Wares; yet for divers years before and afterwards, allows his wife no maintenance; the Tradelman, contrary to the prohibition of the Dusband, fells and delivers divers Mares to the wife upon credit, at a reasonable price; and the Wares so sold and delivered to the wife are necessary for her, and suitable to the dearee of her husband: The Wares are not paid for; wherefore the Travelman brings an Action upon the case against the husband, and declares that the husband was indebted to him in 40 1. for divers wares and Werchandiles formerly to the bufband fold and delivered, and that the Dusband in confideration thereof did promise to pay him the said 40 l. That the Dusband hath not paid the same unto him, although thereunto required; and for that money the Action is brought against And, whether this Action will lie against the Husband for the Wares thus fold and delivered to the wife, against the will, and contrary to the Prohibition of the Busband, og not, is the question? This case is the meanest that ever received Resolution in this place, but as the same is now handled, it is of as great consequence to all the Kings people of this Realm, as any cafe can be; it concerns every individual person of both Seres, that is, or hereafter thall

be married within this Kingdom, in the first and nearest Relation, that is, betwirt man and wife. The holy flate of Matrimony was ordained by Almighty God in Paradile, before the Fall of man, fignifying unto us that mystical Union which is between Chiff and his Church, and so it is the first Relation: And when two persons are joyned in that holy State, they twain become one flesh, and so it is the nearest This case toucheth the man in point of his power and dominion over his wife, and it concerns the woman in point of her substance and livelihood. I will deliver my Opis nion plainly and freely, according as I conceive the Law to be, without favouring the one, or courting the other Ser. I hold, that Judgment ought to be given for the Defendant. The case bath been so fully argued, and all the Authorities so particularly bouched by my Brothers, who have already delivered their Opinions, that nothing is left for me to fay, which hath not been spoken by them in better terms than I can er-It will be a trouble to your Lozothips for me to repeat their Arguments, and vet without doing fo, it will be impossible for me to speak any thing to the purpose. thall be my endeabour therefore, rather to answer the reasons and objections given and made by my two Brothers, who have to copiously argued for the womans power, than to argue the cafe again on the same grounds which have been already delivered.

It is agreed by all my Bothers who have argued, as I conceive, that a Feme covert generally cannot bind of charge her husband by any Contract made by her, without the authority of affent of her husband precedent of subsequent, either expects of implyed. But the question in this case is, if the Contract of a Feme covert for Mares for her necessary Apparel, made without the consent, and contrary to the Prohibi-

tion of her busband, thall bind her husband?

First, I hold that the husband thall not be charged by such a Contract, although he do not allow any maintenance to his

Secondly, admit the husband were chargable generally by such a Contract, yet I conceive that this Action both not lye for the Plaintist, as this Declaration is, and as this Aerdict is found against the Desendant in this particular case.

For the first, every gift, contract or bargain, is or contains an agreement, for the contractor or bargainor will that the donce of bargaine shall have the things contracted for; and the other is content to take them, and so in every Contract there is a mutual assent of their minds, which mutual assent is an agreement: Plow. Com. Fogasla's case. Afterwards in the same case fo. 17. it is said, agreement is a word compounded of two words, scilicet, aggregatio & mentium, so that aggreamentum is aggregatio mentium, or thus, aggreamentum is no other but a union or conjunction of two minds in any matter of thing, done, of to be done, according to that of Sir Edward Cokes, Com. fo. 47. Contractus est quasi actus contra actum: But a feme Covert cannot give a mutual affent of her mind, not do any act without her husband; for her will and mind (as also her felf) is under and subject unto the will of mind of her husband; and consequently she cannot make any bargain of contract (of her felf) to bind her hul-The second ground of the Law of England is the Law of God, Doctor & Student cap. 6. fo. 10. In the begin= ing when God created woman an help-meat for man, he faid, they twain hall be one flesh; and thereupon our Law fays, that husband and wife are but one person in the Law: Prefently after the Fall, the Judgment of God upon woman was, Thy defire shall be to thy Husband, for thy will shall be subject to thy husband, and he shall rule over thee, 3 Gen. 16. Dereupon our Law put the wife sub potestate viri, and says, quod ipla potestatem sui non habeat, sed vir suus, and is disabled to make any grant, contract of bargain, without the allowance of confent of her husband, Brack. lib. 3. cap. 32. fo. 15. The books and authorities of our Law which prove this point, have been all particularly vouched already, and I will not repeat them again, not do I know any one particular point to the contrary. The words of the book are observable, namely, If a Feme Covert make a contract, or buy any thing in the Warket oz elsewhere, without the allowance oz consent of her husband, although it come to the use of the husband, pet the contract is void, and thall not charge the husband; but if a man command of licence his wife to buy things necessary, or agree that the thall buy, he thall be bound by this command oz licence: Old N. Br. 62. 21 H. 7. 70. F. N. Br. 120. which proves, that it is not the buying or contract of the wife, which binds or charges the husband (for that is boid in it felf) but the

the command of licence of the husband, which makes it the

contract or bargain of the husband.

As to my Bother Twisden's saying, that all those books are where the Mise beals of trades as a Factof to her husband, and all grounded upon that reason, the words themselves prove the contrary; sof the difference taken by all these books is, between the buying and contract of the wife without the knowledge of consent of her husband; and a buying of contract had by the wife with allowance of command of the husband. In the first case, the buying of contract is boid, in the other the allowance of command makes it good, as the contract of bargain of the husband: Besides, weigh the inconveniencies which would follow, if the Law were otherwise. Judges in their Judgments ought to have a great regard to the generality of the cases of the Kings Subjects, and to the inconveniencies which may ensue thereon by the one way of

the other, 1 Rep. 52. Altenwoods case. Judges in giving their resolutions in cases depending befoze them, are to judge of inconveniencies as things illegal, and an argument ab Inconventi is very frong to prove that it is against Law. Plo. Com. 279. 379. then examine the inconveniencies which must ensue if the Law were according to my Brother Twisdens and Tyrrells Opinions: If the contract or bargain of the wife, made without the allowance or confent of the husband, thall bind him upon pretence of necessary Apparel, it will be in the power of the wife (who by the Law of God, and of the Land, is put under the power of the husband, and is bound to live in subjection unto him) to rule over her husband, and undo him, maugre his head, and it shall not be in the power of the husband to prevent it. The wife thall be her own Carver, and judge of the fitness of her Apparel, of the time when 'tis necessary for her to have new Cloathes, and as often as the pleaseth, without asking the advice or allowance of her husband; And is such power suitable to the Judgment of Almighty God inflicted upon woman. for being first in the Transgression? Thy desire shall be to thy husband, and he shall rule over thee. Will wives bepend on the kindness and favours of their husbands, or be observant towards them as they ought to be, if such a power be put into their hands?

Secondly, Admit that in truth the wife wants necessary Apparel, Moollen and Lining thereupon, the goes into Pater-Noster-Row to a Wercer, and takes up Stuff, and makes a contract for necessary Clothes, thence goes up into Cheapfide, and takes up Lining there in like manner, and allo goes into a third Street, and fits her felf with Ribbonds, and other necessaries suitable to her occasions and her husbands This done, the goes away, disposeth of the Com-Denree. modities to furnish her felf with money to go abroad to Hide-Park, to score at Gleeke, or the like. Dert morning this good woman goes abroad into some other part of London, makes her necessity and want of Apparel known, and takes more Mares upon truff, as the had done the day before, after the same manner the goes to a third and fourth place, and makes new Contracts for fresh Wares, none of these Tradesmen knowing or imagining the was formerly furnished by the other, and each of them feeing and believing her to have great need of the Commodities fold her; thall not the husband be chargeable and lyable to pay every one of thefe, if the contract of the Wife both bind him? Certainly every one of these hath as just cause to sue the husband as the other, and he is as lyable to the Acion of the last, as the first or second, if the wives contract thall bind him; and where this will end no man can divine or forelee.

As for my Brother Tyrrells saying we may not alter the Law because an inconvenience may follow thereon, that is true: but we ought to forese and provide against such inconveniencies as may arise, before we adjudge or vectare the Law in a particular case in question, whether the Law be so or not. And that is the case here; It is objected, that the husband is bound of common right, to provide sor, and maintain his wise; and the Law having disabled the wise to bind her self by her contract, therefore the burden shall rest upon the husband, who by Law is bound to maintain her, and he shall do it nolens volens; generally the antecedent is most true; sor she is bone of his bone, slesh of his slesh, and no man did ever hate his own slesh, so far as not to preserve

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But apply this general proposition to our particular case, and then see what Logick there is in the argument. I am bound to maintain and provide for my wife: therefore (my wife) departing from me against my will, shall be her own Carver,

Carber, and take up what Apparel the pleafeth upon truft. without my privity or allowance, and I shall be bound to pap for it; this is our case, for there is not a word throughout the whole Merdia, that the wife did want necessary Apparel, that the ever acquainted her husband with any luch matter, that the ever defired the husband to supply her with money to buvit, or otherwife to provide for her: or that the husband did deny, refuse, or neglect to bo it. Beades, although it be true, that the husband is bound to maintain his wife, yet that is with this limitation, viz. so long as the keeps the station wherein the Law hath plac'd her, to long as the continues a help meet unto him; for if a woman of her own head, without the allowance of Judgment of the Church, which hath united them, in the holy State of Watrimony (which only can separate that, or distolve this Union) depart from her husband against his will, (be the pretence what it will) the doth thereby put her felf out of the husbands protection, so that during this unlawful separation, she is no part of her husbands care, The King is the Dead of the Commoncharge or family. wealth: his Office is, and he is bound of right to protect and preferbe his Subjects in their Perfons, Goods and Effates. And on that ground, every Loyal Subject is faid to be within the Kings Protection: Plo. 315. Case of Mynes, F. N. Br. 232.

But a man may put himself out of the Kings Protection by his Offence, as, by forfaking his Allegiance to the King, and owning or letting up any foreign Jurisdiction, and then every man may bo unto him as to the Kings Enemy, and he thall have no remedy of Recovery by the Kings Laws of Writs, 27 E. 3. case the first. The husband is head of the wife, as fully as the King is head of the Common-wealth; and the wife by the Law is put sub potestate viri, and under his protection, although he hath not potestatem vitæ & necis over her, as the King hath over his Subjects. When the wife departs from her husband against his will, the forfakes and deferts his Sovernment, the creas and lets up a new Jurisdiction, and assumes to govern her felf, besides, (at least if not against) the Law of God and of the Land; and therefore it is but just that the Law for this Offence, should put her in the same plight in the petit Common-wealth of the Douthould, that it puts the Subject for the like Offence in the great Common wealth of the Realm; and this according to

the Civil Law, namely, Si Uxor propria (fine Culpa mariti) sit extra consortium viri nec tenet maritus extunc ei extra confortium suum existenti aliqualit' subministrare, videt' enim virum alendi obligatione fore exempt' quoniam Culpa fua extra viri Consortium est. foz, Nuptiæ sunt Conjunctio maris & Fæminæ & Consortium ejus divini & humani Juris Communicatio, digest' de ritu Nuptiarum. Fleta speaking of appeals, hath this expression, Foemina de morte viri sui inter brachia sua intersecti, & non alit' potuit appellare, l. 1. Ca. 33. Bracton is much to the same purpose, li. 3. Chap. 24. fo. 148. non nisi in duobus casibus femina appellum habeat, sc. non nisi de violentia corpori suo illata, sicut de raptu & de morte viri fui interfecti inter brachia sua; and the words of the With of Appeal are suitable thereunto, sc. venit idem A. B. & nequiter & in felonia, &c. occidit ipsum virum suum inter brachia sua, &c. By the words inter brachia sua, in those ancient Authors is understood the wife, which the dead person lawfully had in possession at the time of his death: for the ought to be his wife of right, and also in possession, Com's. Ma. Char. fo. 68. The words of the Wirit are observable, sc. occidit virum fuum inter brachia sua, and prove that the woman ought to be inter brachia viri sui, or otherwise the hath not the priviledge of a wife.

By an argument a pari, as the wife shall not have remedy against the Hurtherer of her husband after his death, if he were not inter brachia sua, at the time of his death, pari ratione she shall not have support or maintenance from her husband in his life, when she putsher self extra brachia sua, against

his will.

But tis objected by my Brother Tyrrell; It appears not in whose default this departure was, whether in his or her default. Thereto I answer, that the Law doth not allow a wife to depart from her husband in any case, or for any cause whatsoever of her own head. An express command is laid upon her by the Law of Sod to the contrary, Cor. 7. 10. To the married I command, yet not I, but the Lord; let not the wife depart from her husband.

The provision which our Law hath made for the lateguard of the person of a woman, in case of cruelty by her husband, and for her maintenance in case the husband refuses to allow it, proves, that it is not lawful for the wife to depart from her husband of her own head, upon any pretence whatsoever.

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If the wife be in fear, or in doubt of her husband, that he will beat of kill her, the thall have a Supplicavit out of the Chancery against her husband, and cause him to find Sureties that he will not beat, not intreat her otherwise then in civil manner, and for to order and rule her, ac. F. N. Br. fo. 179. The words of the Wirit are, Quod ipsum B. coram te corporaliter venire fac', & ipsum B. ad sufficien' manucaption' inveniend', &c. quod ipse præfat' B. bene & Honeste tractabit Gubernabit ac dampnum & malum aliquod eidem A. de corpore suo alit' quam ad virum suum ex causa regiminis & castigationis uxoris suæ licite & rationabilit' pertinet, non faciat nec fieri procurabit. And if the husband refuse to give or allow necessary and fitting maintenance unto his wife, the Law hath provided a remedy for her, by complaint to the Dedinary in the Ecclesiastical Court.

Mert, it is alledged by my Brother Tyrrell, that the wife in our case did return, and desire to cohabit with her husband again, which he refuled, and to the is remitted to her former Admit that be true, yet her return hath not put her in a better condition then the was in befoze her departure, in which case the could not be her own Carver, and have charged her husband (according to her pleasure) with Apparel, but was to be clothed in such sozt as her husband thought fit. Belides, in our case the wife departed from her husband, and lived from him divers years after (before the Mares fold, or the Action brought) then the defired to cohabit with him, which he refused to admit; and from that time the lived from him. This is all that appears in our cale; and is this offence to eafily purg'd, with a bare defire to cohabit, without any other submission and satisfaction given of the better carriage in futuro? The Law of God faps, Wives be in subjection to your husbands as unto the Lord: for the husband is the head of the wife, as Christ is head of the Church, 1 Pet 3, 4. Ephes. 5. 22. The Church declares, that one of the principal ends for which Warriages was ordained, is for the mutual fociety, belp and comfort, which the one ought to have of the other, in prosperity and advertity. It is also there said, the woman of her self in contracting of Parriage, makes a solemn Clow in facie Ecclesia, to live together with her husband, in the holy State of Watrimony, to obey him, and ferve him, to love him, and keep him in lickness and in health, till death them do part.

The wife, in our case, by beparting from her husband against his will, breaks att those commands, and her own Clow; the makes a voluntary separation, and temporary Debosce between her felf and her husband, the deprives him of that mutual fociety, belp and comfort (which the owes to him) for divers years; and are all these Offences walked away with a bare defire, without submission of contrition? We certainly, Confession and promise of future Dbedience, ought to precede her remitter, or relitution to the priviledges of a The Productal Son in the Solvel, laid, I will arise and go to my Father, and fay, I have finned, before the Indulgent Father did receive or Cloath him. And this is according to the rule in the Civil Law, Si Uxor quæ (Culpa fua) recefserat pœnitentia ducta ad virum rediens nolit admitti, eam extunc Culpa purgatur in virum transfundit' tenebitur quæ ipfi feorsum habitanti alimenta præstare. So that the wife ought to be a Penitentiary before the husband is bound to receive ber, or give her any maintenance. And no luch thing ap-

pears, or is found in the Aerdict in our cale.

Its fait by my Brother Twifden: Although the wife beparts from her husband, yet the continues his wife, and the ought not to farve. If a woman be of so haughty a stomack, that the will chuse to starve, rather then submit, and be reconciled to her husband, let her take her own choile. The Law is in no default, which both not provide for such a wife. If a man be taken in execution, and Ipe in Pailon for Debt, neither the Plaintiff at whose suit he is arrested, not the Sherist who took him is bound to find him Weat, Dink or Cloathes; but he must live on his own, or on the Charity of others; and if no man will relieve him, let him dye in the name of Sod, fays the Law; Plow. 68. Dive & Manningham, to fay 3; if a woman who can have no Goods of her own to live on, will depart from her husband against his will, and will not submit her felf unto him, let her live on Charity, og flarve in the name of God; for in such case the Law says, her evil bemeanour brought it upon her, and her death ought to be imputed to her own wilfulnels. As to my Brother Tyrrells Objection, it were frange if our Law, which gives relief in all cales, should send a woman unto another Law or Court to seek remedy to have maintenance. I answer. Its not sending the wife to another Law, but leaving the case to its proper Jurisdiction; the case being of Ecclesiastical Conusance. any

mp trangeness of disparagement to the Common-Pleas, to send a Cut-purle, og other felon taken in the Court, to the Kings: Bench to be Indiated? or to the Kings-Bench, to fend a woman to the Common-Pleas to recover her Dower? With is it more Arange for the Common Law to fend a Moman to the Ozdinary to determine differences betwirt her and her hulband touching matters of Hatrimony, then for our Courts at Common Law to write unto the Ordinary to certific Loyalty of Marriage, Bastardy, of the like, where Issue is joined on these points in the Kings Courts? for although the proceeding and process in the Ecclesiastical Courts be in the names of the Bishops, yet these Courts are the Kings Courts, and the Law by which they proceed is the Kings Law: 5 Rep. 39. Caudries case, but the reason in both cales is, quia hujusmodi causæ cognitio ad forum spectat Ecclesiasticum, 30 H. 6. b. Old book of Entries 288. according to that of Bracton, lib. 3. fo. 107. Stamf. 57. Sunt casus spirituales in quibus Judex secularis non habet cognitionem neque Executionem quia non habet coercionem: In his enim cafibus spectat cognitio ad Judices Ecclesiasticos qui regunt & defendunt facerdotium. Dereunto agrees Cawdries cafe, 5 Rep. 9. As in tempozal causes, the King by the mouth of his Judges in his Courts of Justice, determines them by the temporal Law, to in causes Eccletiastical and Spiritual (the Conufance whereof belongs not to the Common Law) they are vecided and vetermined by the Ecclelianical Judges, according to the Kings Ecclesiastical Laws; And that causes of Watrimony, and the differences between husband and wife touching Alimony, or maintenance for the wife (which are dependant upon, or incident unto Matrimony) are all of Ecclefiaffical, and not of fecular Conusance, is evident by the Books and Authorities of our Laws, de causa Testamentari sicut nec de causa Matrimoniali Curia Regia se non intromittat, sed in foro Ecclesiastico debet placitum terminari, Bracton, lib. 2. cap. 20. fo. 7. All causes Testamentary, and causes of Patrimony by the Laws and Cuffoms of the Realm, do belong to the fpicitual Jurisdiction, 24 H. 8. cap. 2.

The words of the work of Prohibition granted in such cases are, placita de Catallis & debitis que sunt de Testamento vel Matrimonio spectant ad forum Ecclesiasticum. In a sust commenced by a woman against her husband before the Commissioners for Ecclesiastical causes for Alimony, a Prohibiti-

on was prayed, and granted, because it is a suit properly to be brought and prosecuted before the Droinary. In which, if the party find himself grieved, he may have relief by Appeal unto the superiour Court, and that he cannot have upon a sentence given in the high Commission Court, I Cro. 220. Drakes case.

But 'tis objected by my Brother Tyrrell and Twisden, that the remedy in the Ecclesiastical Court is not sufficient: for if the husband will not obey the Sentence of the Didinary, it is but Excommunication for his Contumacy, and will neither feed noz cloath the wife. Are the Centures of the holy Wother the Church, grown of so little Accompt with us, of the separation, a communione fidelium, become so contemptible, as to be flighted, with but Excommunication? hathour Law provided any remedy so penal, or can it give any Judgment so fearful as this? With us the rule is, committicur Marescal', or Prison' de Fleet. There the Sentence is, traditur Satanæ, which Judgment is moze penal. Take him Saofer till he pay the Debt, og take him Devil till he obey the Church. And yet their Judgment is warranted by the rule of St. Paul, whom I have delivered unto Satan, I Cor. 5. 5. whereupon the Coment laps, Anathema ab iplo Christi corpore (quod est Ecclesia) recidit. Causa 3 quest. 4 Cam' Egell trudam, and also, Nullus cum Excommunicatis in oratione aut cibo aut potis, autesculo communicet, nec ave eis dicat. Causa, 2 quest. 3 Can. Excommunicat', Bracton lib. 5. cap. 23. fo. 42. As much is faid by our Law, and it is to the same effect, Excommunicat' interdicitur omnis actus legitimus, Ita quod agere non potest nec aliquem convenire cum ipso, nec orare nec loqui, nec palam, nec abscondité vesci licet.

The second ground of the Law of Excommunication, is the Law of England; and it is a ground in the Law of England, That he which is accursed thall not maintain any Action, Doctor & Stu. 11. There a man is excommunicated by the Law of the Church, if he sue any Action, real og personal, the Tenant of Defendant may plead, that he is Excommunicated, and demand Judgment, if he shall be answered, Lit. 201. the Sentence is set footh at large in the old Statute Book of Magna Charta, and is intituled, Sententia lata super chartas, namely, Authoritate Dei patris omnipotentis & filii & spiritus Sanctie Excomunicamus Anathematizam. & a liminibus Sanctæ matris Ecclesiæ sequestram' omnes illos, &c. 12 H.3.

fo. 146.

fo. 146. De which by the Renunciation is tightfully cut off from the Unity of the Church, and Ercommunicate, ought to be taken by the whole multitude as a Deathen and a Dublican, until he be openly reconciled by Penance. Act 33. conand this is grounded on the rule of firm' per 13 Eliz. cap. our bleffed Saviour, dic' Ecclesiæ; And if he neglect to hear the Church, let him be as an Heathen and Publican, Matt. 18. 17. Shall a man be accurfed, barred of the Company og Society of Chistians, cut off from the body of Chist, accounted as a Deathen and Publican, for not allowing maintenance to his wife, when the Church enjoyns him fo to do; and thall not this be accounted a sufficient remedy for the wife? I fear it is the want of Religion, and due credence to the Centures of the Church, which occasions this Objection, rather then real want of sufficient remedy in Law for her relief.

The last matter to be answered, is rather the Opinion of my Brother Twisden and Tyrrell in their arguments, then an Objection in this case; namely, if an Action upon the case both not lye against the husband upon the Contract of the wife for necessary Apparel, pet an Action of Trober and Conversion both live against him for the Stuff; and so one way or other the husband must pay the reckoning. If the Law should be so, it were a Conversion with a witness, for then the husband should seem to be sub potestate sæminæ: he might glesp in the words of St. Paul, I would have you know, that the head of the woman is the man. But if the wife thall fet his cap, or lap his headthip in the Saol, it thall not be in the power of the husband to prevent or avoid it: one kind of Diboxce between husband and wife is, when Action of Trespass is brought against them, and the husband only appears, and Process iffue out against the wife, until spe be waived and outlawed, the can never purchase her pardon, or reverse the outlaway, unless the husband will appear; so that if the husband please he is divoxed, 14 H. 6. 14. a. If the wife be outlawed by erronious Process, and the husband will not bring a Writ of Erroz, he may by this way be rid of a Shew, and that both countervail a Divozce, 18 E. 4. 4. a.

By these books it appears, that the Law puts a power in the husband to be rid of his wife, and provides a remedy to tame a Shrew; but I never heard before, that the Law hath left it in the power of the wife to do so by her husband; and

I do not remember that my Brothers did bouch any Authority, or give any reason for maintenance of their Opinions; and therefore I may with freedom deny the Law to be as they have faid: besides, the nature of an Action of Trover proves that it lies not in this case. The count is, that the Plaintiff was possessed of such Goods, (and names them) as of his own proper Goods, and calually left them; that the Guods came to the Defendants hands by finding, yet he knowing them to belong to the Plaintiff, refuseth to deliver them to him, but hath converted them to his own use; so that an Action is grounded upon a wrong supposed to be done by the Defendant, in converting the Goods of the Plaintiff knowingly to his own use, against the will of the Plaintist: and that is the reason why the Plaintist in that Action, must prove a demand of the Goods, and an actual Convertion by the Defendant, or elfe he fails in the Action.

In an Action of the Case, for that the Defendant did sind the Goods of the Plaintist, and delivered them to persons unknown, Non deliberavit modo & forma, is no Plea, without saying Not-guilty, where the thing rests in Feasance; and if the Action be, that the Plaintist was possessed, Ut de bonis propriis, and the Defendant did sind and convert them to his own use: It is no plea that the Plaintist was not possessed, Ut de bonis propriis, but he must plead Not-guilty to the misdemeanour, and give the other matter in Evidence, 33 H.8. & Mar. Bro. Action sur le case.

In Trover the Plaintiff veclares, that he was possessed of fuch Goods, and calually left them, and the Defendant found them, and converted them to his own use, the Defendant did plead, that the Plaintiff did gage the Goods unto him for 10 l. and that he detained the Goods for 10 l. this is no Plea; but he ought to plead Not-guilty, and give this matter in Evidence; for the Action doth suppose a wrong, which the Defendant ought to answer, 4 E. 6. Action sur le case 113. What wrong is done to the Plaintist in our case, when he himself sells and delivers the Goods? It is not like the case where two men by mutual consent, wraffle or play at Football together, will an Action of Affault and Battery lye for the one against the other, when the act is done by their mutual agreement befoze hand? Put the case of Sale made to a man upon credit, and the Vendee promifeth to pap for the Goods at Michaelmas, but fails to pay the money accozdingly,

cordingly, shall the Salesman have Trover against the Vendee, because he pays not the money at the day? and will the Sale to this Feme Covert, alter the case, or the Law, as to the Action? its true, that for a Conversion by the woman before Coverture, or by the wife during the Coverture, an Action of Trover lies against the husband and wife; but that is for a Convertion by wong, when the takes the Goods, and converts them against the will of the owner, 1 Cro. 10.254. Remis & Humfrey's case; as in case where a man comes to buy Goods, and offers to l. for them, and the owner agrees to accept the money, whereupon the buyer takes the Goods away without payment or delivery by the owner, there an Action of Trespals of Trover lies, notwithstanding the bargain, 21 H. 7. 6. otherwise it is if they agree upon a pice, and the Vendor takes the Vendee's word for payment, and delivers the Goods unto him; there the Vendor is put to his Action for the money upon the Contract, and Hall not bring Trober

for the Goods, 14 H. 8. 22.

If an Infant give or fells Goods, and delibers them with his own hand, he shall have no Action of Trespals against the Donee of Vendee, by reason of the belivery, 21 H. 7. 39. 26 H. 8. 2. but if an Infant gibe og fell Goods, and the Vendee of Donee takes them by force of the gift of sale, the Infant may have an Action of Trespals against him. So in our cale: If a Feme Covert takes Wares of a Shop-keeper against his will, upon pretence of buying them, an Action lies against the husband; but if the owner sell the Soods to the wife upon trust, and delivers the Goods unto her, he thall not have an Action of Trespass against the husband, by reason of this delivery. If a man take my wife and cloath her, this amounts unto a gift of the Apparel unto her, 11 H. 4.83. and I may take my wife with the Apparel, and no Action lies against me : by the same reason, when a man delivers Stuff, og other Wares to my wife, knowing her to be a Feme Covert, to make Apparel, without mypzivity or allowance, this shall be construed to be a gift of the Stuff unto ber, and I thall not be charged in any Action for it; belides, confider the inconveniencies which will follow, if an Action of Trover should be against the husband: for then the husband shall be barred of all those helps which my Brothers, (who maintain that Opinion) have allowed unto him, and have made reasons, for which an Action of the case thousa the againfi

against him on the Contract; namely, the Jurozs are to eramine and set the price of value, and the necessity and situels of things, with relation to the degree of the husband, whereby care is taken, that the husband have no wrong; for in an Acion of Crover, the Jury cannot examine any of those matters; but are to enquire only of the property of the Plaintist, and the Conversion by the Defendant, and to give damages according to the value of the Goods: and so it shall be in the power of the wife to take up what she pleaseth, and to have what she lists without reference unto the degree of respect to the Estate of her husband, and he shall be charged with it nolens volens.

It is objected, that the Jury is to judge what is fit for the Wilves degrae, that they are trusted with the reasonableness of the price, and are to examine the value; and also the necessity of the things of Apparel. Alas, poor man! what a Judicature is fet up here to decide the private differences between husband and wife, the Wife will have a Aelvet Gown, and a Satten Petticoat, the husband thinks Pohair of Farendon for a Sown, and watered Tabby for a Petticoat, is as fathionable, and fitter for his quality; The husband lays, that a plain Lawn Gogget of 10 s. pleafeth him, and fuits best with his condition, the Wife will have a Flanders Lace, or pointed handkerchief of 401. and takes it up at the Erchange. A Jury of Mercers, Silk-men, Sempfters, and Exchangemen, are very excellent, and very indifferent Judges to decide this controversie; It is not for their avail and support to be against the wife, that they may put off their brayded Mares to the wife upon trust, at their own price, and then sue the husband for the money. Are not a Jury of Diapers and Milliners bound to favour the Wercer of Erchange-men to day, that they may do the like for them to morrow?

And besides, what matter of fact (and of that only the Law hath made Jurozs the Judges) is there in the sitness of the Commodities with reference to the degree of the husband? and whether this oz that thing be the most necessary foz the wife? The matter of fact is, to find that the wife wanted necessary Apparel, and that she bought such and such Mares of the Plaintist, at such a price, to cloath her self, and leaves the sitness of the one, and the reasonableness of the other, to the Court: foz that is matter of Law, whereof the Jurozs have no Conusance. Lesse foz life of a Pouse, puts his Goods therein

therein, makes his Executors, and dies; whosoever hath the Doule after his death, yet his Executors thall have free Entry, Egress and Regress to carry their Testators Goods out of the Doule by reasonable time, Litt. 69. And this reasonable time that be adjudged by the discretion of the Justices before whom the cause depends, upon the true state of the matter, and not by the Jury, Co. super Littleton 56. b. So it is in case of fines for Admittance, Customs and Services, if the Queffion be, whether the same be reasonable or not; for reasonableness belongs to the knowledge of the Law, 4 Rep. 27. Hubarts cafe. Leffe for life makes a Leafe for years, and dies within the term, in an Action of Trespals brought by the first Leffor against the Leffe for years, he ought by his Plea to fet forth what day his Leffor dyed, and at what place, where the Land lies, and at what day he did leave the possession, and so leave it to the discretion of the Court, whether he did quit the possession in reasonable time ognot, 22 E.4.18. Soinors case. The fitness og necessity of Apparel, and the reasonableness of the price, thall be judged by the Court upon the circumstance of the matter, as the same appears by the Pleadings, or is found by the Jury; but the Jurois are not Judges thereof. there is a twofold necessity, necessitas simplex, vel absoluta, and necessitas qualificata, vel convenientiæ; of a simple og abfolute necessity in the case of Apparel or Food for a feme Covert, the Law of the Land takes notice, and provides remedy for the wife, if the husband refuse or neglect to do it. But if it be only necessitas convenientiæ, whether this or that Apparel, this or that meat or brink be most necessary, or convenient for any wife, the Law makes no person Judge thereof, but the husband himself; and in those cases no man is to put his hand between the bone and the fleth.

I will conclude the general question, or first point, with the Judgment of Sr. Thomas Smith in his book of the Commonwealth of England, lib. 1. cap. 11. fo. 23. The naturallest, and first conjunction of two towards the making a further Society of continuance, is of the husband and wise, each having care of the family, the man to get, to travel abroad, to defend; the wise to save, to stay at home and distribute that which is gotten for the nurture of the Children and Family, is the sirst and most natural but primate apparence of one of the best kind of Common-wealths, where not one always, but sometime, and in some things, another bears

rule: which to maintain, Sod hath given to the man greater wit, better frength, better courage to compell the woman to obey, by reason of force, and to the woman beauty, fair Tountenance, and sweet words to make the man obey her again sof love. Thus each obeyeth, and commandeth the other, and they two together rule the Pouse, so long as they remain together in one. I wish with all my heart, that the women of this age would learn thus to obey, and thus to command their husbands: so will they want for nothing that is sit, and these kind of flesh-sies shall not suck up or devour their Husbands Estates by illegal tricks.

I am come now to this particular case, as it stands before us on this Record. Admit that the husband were chargeable by Law by the Contract of his wife, yet Judgment ought to be given against the Plaintiss, upon this Declaration, as this

Clerdiat is found;

first, the Declaration is, That the Defendant was in-Debted to the Plaintiff in 90 1. for Wares and Werchandizes by the Plaintiff to him before that time fold and delivered; and the Aeroic finds, that the Wares were not fold and belivered to the Defendant, but the same were sold to his wife without his privity or consent. So it appears, that the Plaintiff bath mistaken his Action upon the case, for Wares sold unto him, and ought to have declared specially, according to the truth of his case, for Wares sold to his wife for necessary In an Action of Battery against the Dusband and Wife, the Plaintiff counted that they both did Affault and beat him. Apon Not-guilty pleaded, the Jury found, that the Wife alone bid make the Affault, and not the Dusband; Yel. 106. Darcy & Deniers case: and the Aerdia was against the Plaintiff, because now the Plaintiffs Action appeared to be falle; for the Dusband ought not to be joined but for Conformity, and there is a special Action for the Plaintiff in that cale: fo this Clerdic is against the cale, because it appears. that the Action brought by him is falle, and that he ought to have brought another Action upon the special matter of his case, if any such by Law lye for him.

Secondly, The Jury find, that the Defendants wife departed from him against his will, and lived from him, and that the Defendant, before the Wares were solved his wife, did forbid the Plaintist to trust his wife with any Wares. And that the Plaintist, contrary to his Prohibition, did sell

and

and beliver those Wares to the wife upon credit; and I conceive, that this Prohibition doth so far dar, or dind the Plaintiff, that he shall never have any Acion against the Desendant so Wares sold and delivered to his wife, after he was prohibited by the husband. It is agreed by all, that a Feme Covert cannot generally make any Contract, which shall charge or discharge her husband, without the authority or consent of the husband, precedent or subsequent: so that the authority or consent of the husband, is the soundation or ground which makes the contract good against him: but when the husband sorbids a particular person to trust his wise, this Prohibition is an absolute Revocation or Countermand as to the person of the general authority which the wife had desore, and puts him in the same plight as if the wife had never any authority given her.

It is faid by my Wother Twilden and Tyrrell, that the Prohibition of the husband is void, for (lays Tyrrell) the husband is bound to maintain his wife, notwithstanding her departure from him, and therefore he cannot prohibit others

to do it.

and Twisden says, it is a right vested in her by the Law, and therefore the Prohibition of the husband shall not devest,

or take it away from her.

I have already answered and disproved these reasons, on which they ground their Opinions, and will not repeat them here again: but admit that the husband were by Law bound to maintain his wife, notwithstanding her departure from him against his will, and that the Law both give her, or vest a right in the wife to bind or charge the husband by her Contract for necessary Apparel; will this be a good consequence thereupon; Cheresore the husband cannot forbid this or that particular person to trust his wise:

A man makes a feofiment in fér, upon condition that the feofie hall not Alien, this Condition is void, Liet. Sect. 360. Were it not a strange conclusion to say thereupon; If a man make a feofiment in fér, upon Condition that the feosie shall not Alien to J. S. that this Condition is likewise void?

The reason given by Littleton, why the Condition is boid in the sozmer, and not in the later part of this second case:

case, is applicable to our case; namely, the Condition in the first case outs the Feossee of all the power which the Law gives unto him, which should be against reason, and therefore the same is voto; but in the latter case the Condition both not take away all the power of Aliening from the feosse; and therefore it is good: so in our case, if the Prohibition were so general, that the wise were thereby disabled altogether to Cloath her self, peradventeur it might be reasonable to say, that the Prohibition was void; but it being a restriction only to one particular person, there

is no colour to fap, that it is not good.

Tis true (as my Brother Tyrrell fays) that I cannot discharge others to deal with my wife, although I may forbid my wife to deal with them; but it follows not thereupon, but that my Prohibition to a particular person doth make his dealing with, or trusting my wife, to be at his own peril, so that he shall not charge me thereby in an Action; as in case of a Servant, who buys Provision for my Poushold by my allowance; If I forbid a Butcher or other Aictualler, to sell to my Servant without ready money, and he delivers meat to my Servant afterwards upon trust, it is at his peril, he shall have no Action against me for it.

It appears not by this Declaration of Aerdick, that the Defendants Wife did want Apparel, that the ever desired her husband to supply her therewith, that he resuled to allow her what was sit, that the Wares sold to her by the Plaintiss, were for necessary Apparel, or of what nature or price the Wares were; so that the Court may Judge of the necessity or sitness thereof: but only that the Plaintist did sell and deliver upon credit divers of the Wares mentioned in the Declaration unto the wise (whereas none are mentioned therein) for 43 l. that this was a reasonable price for these Wares, and the same Wares were necessary for her, and suitable to the degree of her husband, and for these reasons the Defendant ought to have Judgment in this particular case against the Plaintiss, be the Law what it will in general.

I will conclude all, as the seven Pinces of Persia (who knew Law and Judgments) did in the case of Queen Vasthi, Esther 1 Ca. This Deed that this woman

hath

hath done, in departing from her husband against his will, and taking of Clothes upon trust, contrary to his Prohibition, shall come abroad to all women; and if it shall be repeated that her husband (by the Opinion of the Judges) must pay for the Wares which she so took up, whilst she lived from him, then shall their husbands be despised in their Eyes. But when it shall be known throughout the Realm, that the Law doth not charge the husband in this case, all the Wives shall give to their Husbands honour, both great and small.

Judgment foz the Defendant, Tyrrell, Twisden and Mallett Diffenting.

Term.

Term. Trin. 29 Car. II. 1677. in B.R.

The Earl of Shaftsbury's Case.

E was brought to the Bar upon the Retorn of an Habeas Corpus directed to the Constable of the Tower of London. The effect of the Retoin was, that Anthony Earl of Shaftesbury, in the With mentioned, was committed to the Tower of London, 16 Feb. 1676. by virtue of an Dider of the Logds Spiritual and Tempozal in Parliament assembled; The tenour of which Diver followeth in these words; Ordered by the Lords Spiritual and Temporal in Parliament affembled, That the Constable of His Majesties Tower of London, his Deputy or Deputies, shall receive the bodies of James Earl of Salisbury, Anthony Earl of Shaftsbury, and Philip Lord Wharton, Members of this House, and keep them in safe custody within the faid Tower, during his Majesties pleasure, and the pleasure of this House, for their high Contempt committed against this House; And this shall be a sufficient Warrant on that behalf. John Browne Cler' Parl'. To the Constable, &c.

The Earl of Shaftsbury's Counsel prayed that the Retorn might be filed, and it was so; And Friday following appointed for the vebating of the sufficiency of the Retorn; and in the mean time, directions were given to his Counsel, to attend the Judges and the Attorny-General, with their Exceptions to the Retorn; and my Lord was remanded till that day: And it was said, that though the Retorn was filed, the Court could remand or commit him to the Marshal at their Election.

And on Friday the Earl was brought into Court again, and his Counsel argued the insufficiency of the Retom. Williams said, That this cause was of great consequence, in regard the King was touched in his Prerogative, The

Subject in his Liberty, and this Court in its Jurisdi-

The cause of his Commitment (which is retorned) is not fufficient, for the general allegation, of high Contempts, is too uncertain; for the Court cannot judge of the Contempt, if it both not appear in what act it is. Secondly, It is not thewed where the Contempt was committed, and in favour of Liberty it shall be intended they were committed out of the house of Peers. Thirdly, The time is uncertain, so that peradventure it was before the last Act of general Pardon, I Roll 192, 193. and 219. Ruffells cafe. Fourthly, It both not appear whether this Commitment were on a Conviction, of an Acculation only; It cannot be denied, but that the Retom of such Commitment by any other Court, would be too general and uncertain. Moore 839. Altwick was bailed on a Retorn, Quod commissus suit per mandatum Ni. Bacon, Mil. Domini Custodis magni Sigilli Angliæ virtute cujusdam Contempt' in Curia Cancellariæ fact'; and in that book it appears, that olvers other persons were bailed on such general Retoins, and the cases have been lately affirmed in Bushells case, repeated by the Lord Chief Justice Vaughan, where it is exprefly faid (that on fuch Commitment and Retoins, being too general and uncertain) the Court cannot believe in an implicite manner, that in truth the Commitment was for causes particular and sufficient: Vaughans Rep. 14. accord 2 Inft. 52, 53, 55. and 1 Roll 218. And the Commitment of the Jurous was for acquitting Pen and Mead, contra plenam & manifestam Evidentiam ; and it was resolved to be too general, for the Evidence ought to appear as certain to the Judge of the Retoin, as it appeared before the Judge authotized to Commit: Russells case 137. Dow this Commitment (being by the Poule of Peers) will make no difference: for in all cales where a matter comes in Judgment befoze this Court, let the question be of what nature it will, the Court is obliged to declare the Law, and that without distinction, whether the question began in Parliament of no. In the case of Sir George Binion in C. B. there was a long bebate, whe ther an Diginal might be filed against a Dember of Parliament during the time of priviledge; and it was urged, that it being during the Sections of Parliament, the determination of the question did belong to the Parliament. But it was resolved, an Diginal might be Kiled; and Bridgman

then being Chief Juffice, fait, That the Court was obliced to declare the Law in all cases that come in Judgment before them. Hill. 24 E. 4. Rot. 4. 7. & 10. in Scacc' in Debt by Rivers versus Coufin. The Defendant pleads, he was a Serbant to a Dember of Parliament, and ideo capi feu arrest' non debet; and the Plaintiff prays Judgment, and quia videtur Baronibus quod tale habetur privilegium quod magnates, &c. et eorum familiares capi seu arrestari non debent, Sed nullum habetur privilegium quod non debent implacitari, Ideo respondeat oustr'. So in Treymiards case, a question of paibiledge was determined in this Court, Dyer 60. In the 14 E. 3. in the case of Sir John and Sir Geoffrey Staunton, (which was cited in the case of the Earl of Clarendon, and is entred in the Lords Journal) an Action of Waste depended between them in the Common-Pleas, and the Court was divided, and the Record was certified into the Doule of Parliament, and they gave direction that the Judgment should be entred for the Plaintiff. Afterwards, in a Writ of Erroz brought in this Court, that Judgment was reverled notwithstanding the Objection, That it was given by Diver of the House of Loids, for the Court was obliged to proceed according to the Law in a matter which was before them in point of Judgment.

The construction of all Acts of Parliament is given to the Courts at Westminster. And accordingly they have adjudged of the Calibity of Aces of Parliament. They have fearched the Rolls of Parliament, Hob. 109. Lord Hudsons case. They have determined whether the Journals be a Record, Hob. 110. When a point comes before them in Judgment, they are not fozeclosed by any Act of the Lozds. If it appears that an Act of Parliament was made by the King and Lords, without the Commons, that is Felo de se, and the Courts of Westminster do adjudge it boid; 4 H. 7. 18. Hob. 111. and accogdingly they ought to do. If this Retom contains in it that which is fatal to it felf, it must stand of fall thereby. It hath been a queffion often resolved in this Court, when a Writ of Erroz in Parliament Hall be a Supersedeas. And this Court hath determined what shall be faid to be a Session of Parliament, 1 Roll 29. and if the Law were otherwise, there would be a failour of Justice. If the Parliament were Dissolved, there can be no question, but the Prisoner should be discharged on a Habeas Corpas; and yet then the Court must eramine the cause of his Commitment : and by consequence a

mattet Parliamentary. And the Court may now have cognisance of the matter as clearly as when the Parliament is Dissolved. The party would be without remedy for his Liberty, if he could not find it here; for it is not sufficient for him to procure the Lords to determine their pleasure for his Imprisonment, for before his enlargement he must obtain the pleasure of the King to be determined, and that ought to be in this Court, and therefore the Prisoner ought first to resort hither.

Let us suppose (for it both not appear on the Retom, and the Court ought not to enquire of any matter out of it) that a supposed contempt was a thing done out of the Pouse, it would be hard for this Court to remand him. Suppose he were committed to a foreign prison during the pleasure of the Lords, no doubt that would have been an illegal Commitment against Magna Charta, and the Petition of Right. There the Commitment had been expressly illegal; and it may be this Commitment is no less: for if it had been expressly shewn, and he be remanded, he is committed by this Court,

who are to answer for his Imprisonment.

But fecondly, The duration of the Imprisonment, during the pleasure of the King and of the Douse, is illegal and uncertain; for fince it ought to betermine in two Courts, it can have no certain period. A Commitment until he thall be Discharged by the Courts of Kings-Bench and Common-Pleas is illegal; for the Priloner cannot apply himself in such manner, as to obtain a discharge. If a man be committed till further Dider, he is bailable presently; for that imports till he thall be delivered by due course of Law, and if this Commitment have not that fense, it is illegal; for the pleasure of the King is that which shall be determined according to Law in his Courts; as where the Statute of Westm' 1. cap. 15. beclares, that he is not replevitable, who is taken by command of the King, it ought to extend to an extrajudicial command, not in his Courts of Justice, to which all matters of Judicature are delegated and distributed, 2 Inft. 186, 187.

Wallop to the same purpose; he cited Bushells case, Vaughan's Rep. 137. that the general Retorn sor high Contempts was not sufficient; and the Court that made the Commitment in this case, makes no difference; sor otherwise one may be imposed.

imprisoned by the bouse of Peers unjustly for a matter relievable here, and pet thall be out of all relief by fuch a Retoin; for upon a supposition, that this Court ought not to meddle where the person is committed by the Peers, then any person, at any time, and for any cause, is to be subject to perpetual Impisonment at the pleasure of the Lozds. the Law is otherwise; for the house of Lords is the supream Court, pet their Jurisdiction is limited by the Common and Statute Law; and their excelles are examinable in this Courts for there is areat difference between the errors and excelles of a Court, between an erroneous proceding, and a proceeding without Jurisdiction, which is void, and a meer nullity; 4H. 7.18. In the Parliament, the King would have one Attaint of Treason, and lose his Lands, and the Lozds affented, but nothing was faid of the Commons; wherefore all the Juffices held that it was no Ad, and he was reflozed to his Land; and without doubt in the same case, if the party had been implifoned, the Juffices must have made the like resolu-

tion, that he ought to have been discharged.

It is a Sollecism, that a man thall be imprisoned by a limited Jurisdiction; and it thall not be examinable whether the cause were within their Jurisdiction of no. If the Lords without the Commons should grant a Tar, and one that refused to pay it should be imprisoned, the Tax is boid; but by a general Commitment the party shall be remeditels: So if the Lords Mall award a Capias for Treason or Felony: By thefe inflances it appears, that their Jurisdiction was restrained by the Common Law; and it is likewise restrained by divers Acts of Parliament, 1 H. 4. cap. 14. No Appeals shall be made, or any way pursued in Parliament. And when a Statute is made, a power is implicitely given to this Court by the fundamental conflictution, which makes the Judges Expositors of Aces of Parliament. And peradventure if all this cale appeared upon the Retorn, this might be a cafe in which they were restrained by the Statute 4 H. 8. cap. 8. That all Suits, Accusements, Condemnations, Punishments, Cozreasons, ac. at any time from henceforth to be put or had upon any Dember for any Bill, speaking or reasoning of any matters concerning the Parliament to be communed of treated of, thall be utterly boid and of none effect.

Row it both not appear but this is a correction or punishment imposed upon the Earl contrary to the Statute; There in no question made now of the power of the Lozds; but it is only urged, that it is necessary for them to declare by virtue of what power they proceed; otherwise the Liberty of every Englishman shall be subject to the Lords, whereof they may deprive any of them against an Act of Parliament; but no ulage can justifie such a proceeding. Ellismeres case of the Postnati, 19. The Duke of Suffolk was impeached by the Commons of high Treason and Wisdemeanors, the Lords were in doubt whether they would proceed on such general Impeachment to impalan the Duke; And the advice of the Judges being demanded, and their resolutions given in the negative, the Lords were latisfied; This cale is mentioned with delign to them the respect given to the Judges, and that the Judges have determined the highest matters in Parliament.

At a conference between the Lords and Commons 3 Aprilis, Car. 1. concerning the Rights and Priviledges of the Subjed, It was declared and agreed, that no freeman ought to be restrained or committed by command of the King, or Priby-Council, or any other (in which the house of Lords are included) unless some cause of the Commitment, Restraint or Deternor be fet forth for which by Law he ought to be committed, ec. Now if the King (who is the head of the Parklament) or his Privy Council (which is the Court of State) ought therefore to proceed in a legal manner; this falenm resolution ought to end all Debates of this matter. It is true, I Roll 129. in Ruffells case. Coke is of Opinion, that the Pring Council may commit without thewing cause; but in his more mature age he was of another Opinion: And accordingly the Law is declared in the Petition of Right, and no inconvenience will enfue to the Lords by making their Marrants more certain.

Smith argued to the same purpose, and said, That a Judge cannot make a Judgment, unless the kact appears to him on a Habeas Corpus: the Judge can only take notice of the kact retoined. It is lawful for any Subject that sinds himself agriced by any Sentence of Judgment, to Petition the King in an humble manner for Rediels; And where the Subject is restrained of his liberty, the proper place for him to apply himself to, is this Court; which hath the supreme power, as

to this purpose, over all other Courts; and an Habeas Corpus issuing here, the King ought to have an accompt of his Subjects: Roll tit. Habeas Corp. 69. Wetherlies case. And also the Commitment was by the Lozds; pet if it be illegal, this Court is obliged to discharge the Prisoner, as well as if he had been illegally imprisoned by any other Court. The Pouse of Peers is an high Court, but the Kings-Bench hath ever been entrusted with the Liberty of the Subject, and if it were otherwise (in case of Imprisonment by the Peers) the power of the King were less absolute, than that of the Lords.

It both not appear but that this Commitment was for breach of priviledge; but nevertheless if it were so, this Court may give relief, as appears in Sir John Benions cafe before cited; for the Court which hath the power to judge what is Priviledge, hath also power to judge what is Contempt against Priviledge. If the Judges may judge of an Act of Parliament, a fortiori they may judge of an Diver of the Logds, 12 E. 1. Butlers case, where he in Reversion brought an Action of Wast, and died before Judgment, and his beir brought an Action for the same Walt; and the King and the Logds determined that it did lye, and commanded the Judges to give Judgment accordingly for the time to come; this is published as a Statute by Poulton, but in Ryley 93. it appears, that it is only an Oder of the King and the Logos, and that was the cause that the Judges conceived that they were not bound by it, but 39 E. 3. 13. and ever fince have adjudged the contrary.

If it be admitted, that for breach of Priviledge the Lords may commit, yet it ought to appear on the Commitment, that that was the cause; for otherwise it may be called a breach of priviledge, which is only a refusing to answer to an Action, whereof the House of Lords is restrained to hold plea by the Statute 1 H. 4. And for a Contempt committed out of the House they cannot commit; for the word Appeal in the Statute extends to all Misdemeanors, as it was resolved by all the Judges in the Earl of Clarendons case, 4 Julii, 1663.

If the Impisonment be not lawful, the Court ought not to remand to his wrongful Impisonment, for that would be an ace of Insuffice to impison him de novo; Vaughan, 156.

It doth not appear whether the Contempt was a voluntary act, or an omission, or an inadvertency, and he hath now suffered five months Imprisonment. False Imprisonment is not only where the Commitment is unjust, but where the deternor is too long, 2 Inst. 53.

In this case, if this Court cannot give remedy, peradventure the Impilonment thall be perpetual; for the King (as the Law is now taken) may Adjourn the Parliament for ten

or twenty years.

But all this is upon supposition, that the Session hath continuance; but I conceive that by the Kings giving his Royal Assent to several Laws which have been enaced, the Session is determined; and then the Older so, the Impliconment is also betermined.

Brook, tit. Parliament 36. Every Seffionin which the King figns Bills, is a day of it felf, and a Sestion of it felf. I Car. 1. cap. 7. A special Act is made, that the giving of the Royal Affent to leveral Bills, thall not determine the Seffion; 'tis true, 'tis there faid to be made for avoiding all doubts. the Statute 16 Car. 1. cap. 1. there is a Proviso to the same purpole. And also 12 Car.2. cap. 1. 11 R. 2. H. 12 By the Definion of Coke 4 Inft. 27. the Royal Affent both not betermine a Section; but the Authorities on which he relies do not warrant his Opinion. Fog 1. In the Parliament Roll 1 H. 6. 7. it appears, that the Royal Affent was given to the Act for the Reversal of the Attainder of the Hembers of Parliament the same day that it was given to the other Bills; and in the same year, the same Parliament as fembled again; and then it is probable the Wembers who had been attainted, were present, and not before; 8 R. 2. n. 13. is only a Judgment in case of Treason, by virtue of a power referver to them on the Statute 25 E. 3. Roll Parliament (7) H. 4. n. 29. and is not an Act of Parliament, 14 E. 3. n. 7, 8, 9. the Aid is first entred on the Roll, but upon condition that the King will grant their other Petitions. ference my Lord Coke makes, that the Act for the Attainder of Queen Katherine, 33 H. 8. was passed befoze the Determination of the Session, is an Erroz; for though the was executed during the Session, yet it was on a Judgment given against the Queen by the Commissioners of Oyer and Terminer, and the subsequent Act was only an Act of Confirmation; but Coke ought to be excused, for all his Motes and Papers

were taken from him; so that this book did not receive his last hand: But it is observable, that he was one of the Dembers of Parliament, I Car. 1. when the special Act was passed. And afterwards the Parliament did proceed in that Session only, where there was a precedent agreement betwirt the King and the Houses. And so concluded, that the Order is determined with the Session, and the Earl of Shastesbury ought to be discharged.

argued to the same effect, and said, that the Warrant is not fufficient; for it both not appear that it was made by the Jurisdiction that is exercised in the Poule of Peers; for that is coram Rege in Parliamento: So that the King and the Commons are present in supposition of Law. And the Writ of Erroz in Parliament is, Inspecto Recordo, nos de Confilio, advisamento Dominorum Spiritual' & Temporalium & Commun' in Parliament', præd' existen', &c. It would not be difficult to prove, that anciently the Commons did affift there: And now it shall be intended that they were present; for there can be no averment against the Record. The Lords do feveral acts as a diffinat Poule; as the debating of Bills, enquiring of Franchifes and Priviledges, ec. And the Warrant in this case (being by the Logos Spiritual and Tempotal) cannot be intended otherwise, but it was done by them in their diffinct capacity : And the Commitment being during the pleasure of the King and of the House of Peers, it is manifest that the King is principal, and his pleasure ought to be determined in this Court.

If the Lozds should Commit a great Pinister of State, whose advice is necessary for the King and the Realm, it cannot be imagined that the King should be without remedy for his Subject, but that he may have him discharged by his Writ

out of this Court.

This present recess is not an ordinary Adjournment: for it is entred in the Journal, that the Parliament shall not be aftembled at the day of Adjournment, but adjourned or provogued till another day, if the King do not signific his pleature by Proclamation.

Some other exceptions were taken to the Retom.

first, That no Commitment is retomed, but only a War-rant to the Constable of the Cower to receive him.

second.

Secondly, The Retorn does not answer the mandate of the Whit; for it is to have the body of Anthony Earl of Shastesbury, and the Retorn is of the Warrant for the imprisonment of Anthony Ashly Cooper Earl of Shastesbury.

Maynard to maintain the Retonn. The bouse of Lords is the supream Court of the Realm; 'Cis true, this Court is superiour to all Courts of ordinary Jurisdiction: If this Commitment had been by any inferiour Court, it could not But the Commitment is by a Court have been maintained. that is not under the comptroll of this Court, and that Court is in Law litting at this time; and so the expressing of the Contempt particularly, is matter which continues in the deliberation of the Court: 'Tis true, this Court ought to determine what the Law is in every case that comes before them; and in this case, the question is only, whether this Court can judge of a Contempt committed in Parliament during the same Seffion of Parliament, and discharge one committed for luch Contempt? When a question arises in an Action depending in this Court, the Court may determine it ; but now the question is, whether the Lozds have capacity to Determine their own priviledges; and whether this Court can comptroll their determination, and discharge (during the Seffion) a Peer committed fog Contempt. The Judges have often demanded what the Law is, and how a Statute hould be expounded of the Lords in Parliament, as in the Statute of Amendments, 40 E. 3. 84. 6. 8. Co. 157, 158. a fortiori the Court ought to demand their Opinion when a boubt arises on an Order made by the Poule of Lords now fitting.

As to the duration of the Impilonment, doubtless the pleasure of the King is to be determined in the same Court where Judgment was given. As also to the determination of the Session, the Opinion of Coke is good Law, and the addition of Proviso's in many Acts of Parliament, is only in

majorem cautelam.

Jones Attorney General, to the same effect. As to the uncertainty of the Commitment, it is to be considered, that this case differs from all other cases in two circumstances; first, the person, that is a Dember of the House, by which he is committed. I take it upon me to fay, that the case would be different if the person committed were not a Peer.

Secondly, The Court that both commit: which is a lui periour Court to this Court; and therefore if the Contempt had been particularly thewn, of what Judgment foever this Court flouid have been as to that Contempt, pet they could not have discharged the Earl, and thereby take upon them a Jurisdiction over the Doule of Peers. The Judges in no age have taken upon them the Judgment of what is Lex & confuetudo Parliamenti; but here the attempt is to engage the Judges to give their Opinion in a matter whereof they might babe refused to have given it, if it had been demanded in Par-This is true, if an Action be bought where mibiledge is pleaded, the Court ought to judge of it as an ineldent to the Suit, whereof the Court was possessed: but that will be no warrant for this Court to assume a Judgment of an oziginal matter ariting in Parliament. And that which is faid of the Judges power to expound Statutes, cannot be denied; but it is not applicable in this cafe.

By the same reason that this Commitment is questioned, every Commitment of the Poule of Commons may be like-

wife queffioned in this Court.

It is objected, That there will be a failer of Justice, if the Court should not discharge the Carl; but the contrary is true, for if he be discharged, there would be a manifest failer of Justice; for Offences of Parliament cannot be punished any where but in Parliament; and therefore the Carl would be delivered from all manner of punishment for his Offence, if he be discharged: For the Court cannot take Bail but where they have a Jurisdiction of the matter, and so delivered out of the hands of the Lords, who only have power to punish him.

It is objected, That the Contempt is not fair to be committed in the House of Peers; but it may well be intended to be committed there; for it appears he is a Dember of that House, and that the Contempt was against the House. And besides, there are Contempts whereof they have cognizance, though they are committed out of the House.

It is objected, That it is possible this Contempt was committed before the general pardon; but surely such Injustice should not be supposed in the supposed Court; and it may well be supposed to be committed during the Session in which the

Com:

Commitment to Prison was. It would be great difficulty for the Lords to make their Commitments to exact and particular, when they are imployed in the various affairs of the Realm; and it hath been adjudged on a Retoin out of the Chancery of a Commitment for a Contempt against a Decres.

that it was good, and the Decree was not thewn.

The limitation of the Impilonment is well; for if the King of the Poule Determine their pleasure, he thall be discharged: for then it is not the pleasure of both that he should be detained; and the addition of these words (during the pleasure) is no moze than was befoze imply'd by the Law : for if these words had been omitted, pet the King might have pardoned the Contempt, if he would have expressed his pleafure under the Broad Seal. If Judgment be given in this Court, that one should be imprisoned during the Kings pleas fure, his pleasure ought to be determined by Pardon, and not by any act of this Court. So that the King would have no prejudice by the Imprisonment of a great Minister, because he could discharge him by a Pardon; the double limitation is for the benefit of the Prisoner, who ought not to complain of the buration of the Impilonment, fince he hath neglected to make application for his discharge in the ordinary way.

I confels by the determination of the Sellion, the Divers made the fame Seffion are bischarged; but I thall not affirm whether this prefent Order be discharged or no, because it is a Judgment: but this is not the prefent cafe; for the Seffion continues notwithstanding the Royal Assent given to several Bills, according to the Opinion of Cooke, and of all the Audres, Hutton 61, 62. Every Proviso in an Act of Parliament, is not a determination what the Law was before; for they are often added for the latisfaction of those that are impo-

rant of the Law.

Winington Solicitor General, to the same purpose; In the great case of Mr. Selden 5 Car. 1. the Warrant was for notable Contempts committed against us and our Government, and firring up Sedition; and though that be almost as general as in our case, pet no objection was made in that cause in any of the arguments, Rushworths Collections 18, 19. in the But I agree, that this Retorn could not have bein maintained, if it were of an inferiour Court; but during the Sellion this Court can take no cognizance of the matter ?

and the inc onveniency would be great, if the Law were otherwife taken, for this Court might adjudge one way, and the house of Peers another way; which doubtless would not be for the advantage or liberty of the Subject; for the abolding of this mischief, it was agreed by this whole Court in the case of Barnadiston and Soames, that the Action for the double Retorn could not be brought in this Court, before the Parliament had determined the right of the Election, less there should be a dif-

ference between the Judgments of the two Courts.

When a Judgment of the Lords comes into this Court, (thoughit be of the reversal of a Judgment of this Court) this Court is oblined to execute it; but the Judgment was nes ver examined or corrected here. In the case of my Lord Hollis it was resolved, that this Court bath no Jurisdiction of a mis-Demeanour committed in the Parliament; when the Parliament is determined, the Judges are Expolitors of the Acts, and are intrusted with the lives, liberties and fortunes of the Subjects: And (if the Sessions were determined) the Earl might apply himself to this Court; for the Subject Hall not be without place where he may refort for the recovery of his liberty; but this Sellion is not betermined. for the moft part the Royal Affent is given the last day of Parliament; as faith Plow. Partridges case. Pet the giving of the Royal Affent both not make it the last day of the Parliament, without a subsequent Dissolution of Prozogation. And the Court Audicially takes notice of Prozogations or Adjournments of Parliament, Cro. Jac. 111. Ford versus Hunter. And by confequence, by the last Adjournment, no Dider is discontinued, but remains as if the Parliament were actually affembled, Cro. Jac. 342. Sir Charles Heydon's case; so that the Earl ought to apply himself to the Lords who are his proper Judnes.

It ought to be observed, that these Attempts are prime Impressions; and though Imprisonments for Contempts have been frequent by the one and the other Doule, till now no per-

fon ever fought enlargement here.

The Court was obliged in Infice to grant the Habeas Corpus, but when the whole matter being disclosed, it appears upon the Return, that the case belongs ad aliud examen, they ought to remand the party.

As to the limitation of the Impilonment, the King may determine his pleasure by Pardon under the Great Seal, or War-

cant

rant for his discharge under the Privy Seal, as in the case of

Reniger & Fogaffa, Plow. 20.

As to the Exception, that no Commitment is returned, the Constable can only shew what concerns himself, which is the Warrant to him directed; and the Wirit doth not require him to return any thing else.

As to the Exception, that he is otherwise named in the Commitment then in the Whit, the Write requires the body of Anthony Earl of Shaftesbury, quocunque nomine Censeatur

in the Commitment.

The Court delivered their Opinion; and first Sir Thomas Jones Justice said, such a Retorn made by an ordinary Court of Justice, would have been ill and uncertain; but the case is different when it comes from this high Court, to which so great respect hath been paid by our Predecess, that they deferred the determination of doubts conceived in an Ac of Parliament, until they had received the advice of the Lords in Parliament. But now instead thereof, it is demanded of us to comptroll the Judgment of all the Peers given on a Dember of their own Pouse, and during the continuance of the Sesson. The cases where the Courts of Westminster have taken cognizance of Priviledge, dister from this case; sor in those it was only an incident to a case before them which was of their cognizance; but the direct point of the matter now, is the Judgment of the Lords.

The course of all Courts ought to be considered; for that is the Law of the Court, Lane's case 2 Rep. And it hath not been assumed that the usage of the Pouse of Lords hath been to express the matter more punctually on Commitments for Contempts; And therefore I shall take it to be according to the course of Parliament, 4 Inst. 50. It is said, that the Judges are Assistants to the Lords to inform them of the Common Law, but they ought not to judge of any Law Custom or

wage of Parliament.

The objection as to the continuance of the Impilonment, hath received a plain answer; for it shall be betermined by the pleasure of the King, or of the Lords; and if it were otherwise, yet the King could pardon the Contempt under the Great Seal, or discharge the Impissonment under the Privy Seal. I shall not say what would be the consequence (as to this Impissonment) if the Session were determi-

ned, for that is not the present case; but as the case is, this Court can neither Bail nor discharge the Earl.

Wyld Justice, The Retorn no doubt is illegal; but the question is on a point of Jurisdiction, whether it may be eramined here; this Court cannot intermeddle with the transactions of the high Court of Peers in Parliament during the Session, which is not determined; and therefore the certainty of uncertainty of the Retorn is not material, for it is not eraminable here; but if the Session had been determined, I should be of Opinion that he ought to be discharged.

Rainsford Chief Justice, This Court hath no Jurisdiction of the cause, and therefore the form of the Retorn is not confiderable; we ought not to extend our Jurisdiction beyond its due limits, and the Actions of our Predecessors will not warrant us in such Attempts; The consequence would be very mischievous, if this Court should deliver the Dembers of the Poules of Peers and Commons who are committed; for thereby the business of the Parliament may be retarded; for perhaps the Commitment was for evil behaviour, or undecent Resections on the Pembers, to the disturbance of the assairs of Parliament.

The Commitment in this case is not for safe custody, but he is in Execution on the Judgment given by the Lords for the Contempt; and therefore if he be bailed, he will be delivered out of Execution; because for Contempt in facie Curix, there is no other Judgment or Execution. This Court hath no Justisdiation of the matter, and therefore he ought to be remanded: And I deliver no Opinion, if it would be otherwise in

cafe of 192020gation.

Twisden Justice was absent; but he desired Justice Jones to beclare, that his Opinion was, that the party ought to be remanded.

And so he was remanded by the Court.

Term.

Term. Trin. 26 Car. II. 1674. in B.R.

Pybus versus Mitford. ante 121.

Dis case having been several times argued at the Bat, received Judgment this Term. The case was, Michael Mitford was feifed of the Lands in question in fee, and had Issue by his second wife Ralph Mitford; and 23 Jan' 21 Jac. by Indenture made between the fato Michael of the one part, and Sir Ralph Dalivell and others of the other part, he covenanted to fland immediately feifed after the date of the faid Indenture (amongst others) of the Lands in question, by these words, viz. To the use of the beirs Hales of the said Michael Mitford, begotten of to be begotten on the body of Jane his wife, the Revertion to his own right Deirs; after which Michael dyed, leaving Issue Robert his Son and Deir by a first Venter, and the fato Ralph by Jane his fecond wife; after the death of Michael, Robert entred, and from Robert by divers Mesne Conveyances a Citle was beduced to the Beir of the Plaintiff; Ralph had Issue Robert the Desendant. And in this special Aeroia the question was, If any Ase vio arise to Ralph by this Inventure 23 Jan' 21 Jac'? Hales, Rainsford and Wyld, (against the Opinion of Twifden) Michael Micford took an Estate for life by implication and consequence, and so had an Estate Tail. Hales (1) sato it were clear if an Effate for life had been limited to Michael, and to the heirs males of the body of Michael, to be begotten on the body of his fecond wife; that had been an Effate Tatt. (2) Which way soever it be, the Estate is longed in Michael during his life. (3) There is a great difference between Effaces to be conveyed by the rules of the Common Law, and Effates conveyed by way of Ale: for he may mould the ale in himself in what estate he will. These things being premiled, he faid, This Effate being turned by operation of Law into an Effate in Michael, is as firong as if he had limited an Effate to himfelf for life. (2) A Limitation to the Deirs of his body, is in effect a Limitation to the Ale of himfelf; for his Heirs are included in himfelf. (3) It is perfectly according to the intention of the party, which was, that his eldeff Son should not take, but that the Issue of the second wife should take.

1 Object.

his intent appears to be, that it should take effect as a future use.

Respons.

When a man limits a Ale to commence in futuro; and there is such a descendible quality lest in him, that his Deirs may take in the mean time, there it shall operate solely by way of suture Ale; as if a man Covenant to stand seized to the use of J. S. after the expiration of 40 years, or after the death of J. D. there no present alteration of the Estate is made, but it is only a suture use, because the Father or the Ancestor had such an Interest lest in him which might descend to his Heir; viz. during the years, or during the life of J. D. But when no Estate may by reason of the Limitation descend to the Heir until the Contingency happen, there the Estate of the Covenantor is moulded to an Estate so life.

2 Object. Respons. This would be to create an Estate by implication. The are not here to create an Estate, but only to qualifican Estate which was in the Ancestoz befoze.

3 Object. Respons.

That the old Fee-timple thall be left in him. Pet the Covenantoz had qualified this Estate, and converted it into an Estate Tail, viz. part of the old Estate.

4 Object.

That the intention of the parties appears that it should operate by way of future use; for that of other Lands he covenanted to stand seised to the use of himself, and his heirs of his body.

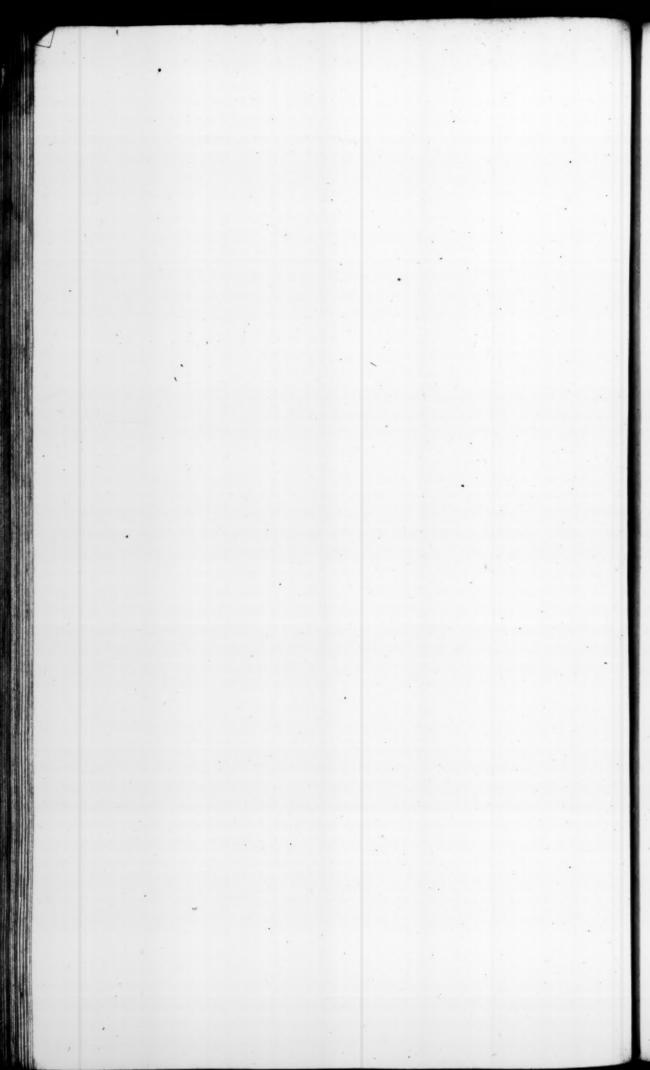
Respons.

It is not the intention of the party that shall comptroll the operation of Law; and to the case 1 Inst. 22. though it be objected that it was not necessary at the Law to raise an Estate for life by implication, yet my Lord Coke hath taken notice what he had said in the case of Parnell and Fenn, Roll Rep. 240. if a man make a Feosiment to the use of the Peirs of his

his body, that is, an Estate for life in the Feosso, and in Englefields case, as it is reported in Moore 303. It is agreed, that if a man Covenant to stand seised to an use to commence after his death, that the Covenantor thereby is become seised for life.

As to the second point, Twisden, Rainsford and Wyld, held, that no suture use would arise to Ralph, because he is not heir at Common Law, and none can purchase by the name of heir, unless he be heir at Common Law; But Hales was against them in this point, and he held, that if Ralph could not take by descent, yet he might well take by purchase, (1) Because hefoge the St' de Donis, a limitation might be made to this heir, and so he was a special heir at Common Law. (2) It is apparent that he had taken notice that he had an heir at the Common Law, Litt. Sect. 35. 1 Inst. 22. So his intent is evident, that the heir at the Common Law should not take. But on the sirst point Judgment was given so the Desendant.

Y Term.



Term. Mich. 25 Car. II. in Communi Banco.

Anonymus.

F a man be lyable to pay a yearly fum, as Treasurer to a Church, or the like, to a Sub-treasurer or any other, and dies, the money being in arrear, an Action of Assumplit cannot be maintained against his Erecutors for these ar-For although, according to the resolution in Slade's case, 4 Report, (which Vaughan Chief Justice said, was a france resolution) an Assumplie og an Action of Debt is maintainable upon a Contract, at the parties Election, pet where there is no Contract, not any personal pubity, as in this case there is not, an Assumplit will not lye. And in an Action of Debt for these Arrears, the Plaintiff must aver, that there is so much money in the Treasury, as he bemands; and in this case of an Action against Executors, that there was so much at the time of the Testators death, ec. for the money is due from him as Treasurer, and not to be paid out of his own Effate. As in an Action against the Kings Receiver, the Plaintiff must fet forth, that he has so much monep of the Kings in his Coffers.

Magdalen Colledge Cafe.

Magdalen Colledge in Oxford for this force pounds due for Butter and Cheefe fold to the Colledge. The Chancellor of the University demanded Conisance by virtue of Charters of Priviledges granted to the University by the Kings Progenitors, and consirm'd by Ac of Parliament; whereby, amongst other things, power is given them to hold plea in personal Actions, wherein Scholars or other priviledged persons are

concerned, and concludes with an expects demand of Conifance in this particular cause. Baldw. Their priviledge ertends not to this case; for a Corporation is Defendant; and their Charters mention priviledged persons only. Their Charters are in derogation of the Common Law, and must be taken strictly. They make this demand upon Charters confirm'd by Act of Parliament: and they have a Charter granted by King Henry 8. which is confirm'd by an Act in the Ducens time; but the Charter of 11 Car. 1. (which is the only Char= ter that mentions Corporations) is not confirm'd by any Act of Parliament, and consequently is not material, as to this For a demand of Conisance is stricti Juris. demand. admitting it material, the Kings Patent cannot depilve us of the benefit of the Common Law: and in the Aice-Chancellogs Court they proceed by the Civil Law. If you allow this demand, there will be a failer of Justice : for the Defendants, being a Composation, cannot be arrested, they can make no flipulation, the Aice-Chancellogs Court cannot iffue Distringas's against their Lands, not can they be excommuni-Defidents we find of Copposations fuing there as Plaintiffs (in which case the afoze-mentioned inconvenience does not ensue) but none of Actions brought against Copporations.

Maynard contra. Servants to Colledges and Officers of Cozpozations have been allowed the pziviledge of the University; which they could not have in their own right: and if in their Masters right, a fortiori their Masters shall enjoy it. The word persona in the demand, will include a Cozpozation

well enough.

Vaughan Chief Justice. Perhaps the words at que confirmat', &c. in the demand of Conisance, are not material: for the priviledges of the University are grounded on their Patents, which are good in Law, whether consum's by Parliament, or not. The word persona does include Corporations: 2 Inst. 536. per Coke, upon the Statute of 31 Eliz. cap. 7. of Cottages and Immates. A demand of Conisance is not in derogation of the Common Law: for the King may by Law grant tenere placita: though it may fall out to be in derogation of Westminster-Hall. Nor will there be a failer of Justice: for when a Corporation is Desendant, they make them give Bond, and put in Stipulators, that they will satisfie the Judgment; and if they do not perform the Condition of their

Bond, they commit their Bail. They have enjoyed these piviledges some hundreds of years ago. The rest of the Judges agreed, that the University ought to have Conisance. But Arkyns objected against the form of the demand, that the word persona privilegiata cannot comprehend a Corporation in a demand of Conisance, howsoever the sense may carry it in an Ac of Parliament. Ellis & Wyndham. If neither Schollers, nor priviledged persons had been mentioned, but an express demand made of Conisance in this particular cause, it had then been sufficient; and then a sault, if it be one, in Surplusage, and a matter that comes in by way of Preface, thall not hurt. Atkyns. It is not a Preface, they say it as the soundation and ground of their claim. The demand was alsowed as to matter and form.

Rogers & Danvers.

The against S. Danvers and D. Danvers, Executors of G. Danvers, upon a Bond of 100 l. entred into by the Testator. The Desendants pleaded that G. Danvers the Testator had acknowledged a Recognisance in the nature of a Statute Staple, of 1200 l. to J. S. and that they have no assets ultra, &c. The Plaintist replied, that D. Danvers, one of the Desendants was bound together with the Testator in that Statute, to which the Desendants bemur.

Baldwin pro Defendente. If this plea were not good, we might be doubly charged. It is true, one of us acknowledged the Statute likewife: but in this Action we are sued as Executors. And this Statute of 1200 l. was joynt and several; so that the Conise may at his Election, either sue the surviving Conisor, or the Executors of him that is dead: so that the Testators Goods that are in our hands, are lyable to this Statute. It runs, concesserunt so utrumque eorum: if it were joynt, the charge would survive; and then it were against us. It is common for Executors upon pleinment administer pleaded, to give in Evidence payment of Bonds, in which themselves were bound with the Testator: and sometimes

fuch persons are made Executors sor their security. The Opinion of the Court was against the Plaintist; where-upon he prayed leave to discontinue, and had it.

Amie & Andrews.

Slumplit. The Plaintiff declares, that whereas the father of the Defendant was endebted to him in 201. for Walt fold, and promifed to pay it, that the Defendant, in confideration that the Plaintiff would bying two Witnesses before a Justice of Peace, who upon their Daths should depole, that the Defendants Father was so endebted to the Plaintiff, and promifed payment, assumed and promifed to pay the money; then avers, that he did bying two Witneffes, ec. who did swear, ec. The Defendant pleaded non Assumplit; which being found against him, he moved by Sergeant Baldwin in Arrest of Judgment, that the consideration was not lawful : because a Justice of Peace not habing power to administer an Dath in this case, it is an ertrajudicial Dath, and consequently unlawful. And Vaughan was of Opinion, that every Dath not legally administred and taken, is within the Statute against prophane swearing. And he laid it would be of dangerous consequence to countenance thefe extrajudicial Daths, for that it would tend to the overthrowing of Legal proofs. Wyndham & Atkins thought it was not a prophane Dath, nor within the Statute of King James; because it tended to the determining of a controverse. And accordingly the Plaintiff had Judgment.

Horton & Wilson.

Prohibition was prayed to stay a Suit in the Spiritual Court, commenced by a Proctor for his Fees. Vaughan & Wyndham. Do Court can better judge of the fees that have been due and usual there, then themselves. Host of their Fees are appointed by constitutions Provincial, and they prove them by them. A Proctor lately libell'd in the Spiritual Court for his fees, and amongst other things demanded a groat foz every Instrument that had been read in the cause: the Client pretended that he ought to have but 4 d. They gave Sentence for the Defendant; the Plaintiff appealed, and then a Prohibition was prayed in the Court of Kings Bench. The Opinion of the Court was, that the Libell for his Fees was most proper for the Spiritual Court: but that because the Plaintist there demanded a customary Fee, that it ought to be determin'd by Law, whether such a Fee were customary of no: and accordingly they granted a Prohibition in that cale. It is like the cale of a modus for Tythes: for whatever arifeth out of the custom of the Kingdom, is properly determinable at Common Law. this case they were of Opinion, that the Spiritual Court ought not to be probibited: and therefore granted a Prohibition, quoad some other particulars in the Libell, which were of tempozal cognisance, but not as to the suit for fees. Wyndham said, if there had been an actual Contract upon the Retainer, the Plaintiff ought to have sued at Law. thought a Prohibition ought to go for the whole. Fee, he fair, had no relation to the Jurisdiction of the Spiritual Court, noz to the cause in which the Proctor was retain'd. No Suit ought to be fuffered in the Spiritual Court, when the Plaintiff has a remedy at Law: as here he might in an Action upon the cale, for the Retainer is an implied Contract. A difference about the grant of the Office of Register in a Bishops Court, thall be tried at Common Law, though the Subjectum circa quod be Spiritual: 2 Rolls 285. placito 45. & 2 Rolls 283. Wadworth & Andrewes. Shall a fir Clark prefer a Bill in Equity for his fees? But a Prohibition was granted, quoad, &c.

Glever

Glever versus Hynde & alios.

TLever brought an Action of Trespals of Assault and T Battery against Elizabeth Hynde and fir others ; for that they at York-Castle in the County of York, him the said Plaintiff with force and arms did Affault, beat and evil entreat, to his damage of 100 l. The Defendants plead to the Vi & armis, not guilty: to the Affault, beating and evil entreating, they say, that at such a place in the County of Jackson a Curate was performing the Lancaster, one Rites and Funeral obsequies, according to the usage of the Thurch of England, over the body of there lying dead, and ready to be buried: and that then and there the Plaintiff did maliciously disturb him; that they, the Defendants, required him to delift, and because he would not, that they to remove him, and for the preventing of further diffurbance, molliter ei manus imposuerunt, &c. quæ est eadem transgressio, absque hoc that they were guilty of any Assault, ec. within the County of York, or any where elfe, extra Co-The Plaintiff Demurg. Turner pro mitatum Lancastriæ. Querente. The Defendants do not show that they had any Authority to lay hands on the Plaintiff; as that they were Constables, Church-wardens of any Officers: not do they justifie by the Authority of any that were. If they had pleaded that they laid hands on him to carry him befoze a Justice of Peace, perhaps it might have alter'd the cale. The Plaintiff here, if he be faulty, is lyable to Ecclefiaffical Centure; and the Statute of Ph. & Ma. ann. 1. cap. 3. provides a reme-Jones contra. If the Statute of Ph. & Ma. dy in luch cales. did extend to this case, pet it does not restrain other ways that the Law allows to punish the Plaintist, or keep him quiet. Dur Saviour himfelf has given us a President; he whipt buyers and fellers out of the Temple; which act of buying and felling was not fo great an impiety, as to diffurb the wozthip of Sod in the very act and exercise of it.

Court. The St. of 1 Ph. & Ma. concerns Preachers only: but there is another Act made 1 Eliz. that extends to all men in Diders, that perform any part of publick Service. But neither of these Statutes take away the Common Law. And at the Common Law any person there present might have re-

moved

moved the Plaintist: for they were all concernd in the Service of God, that was then performing; so that the Plaintist in disturbing it, was a Rusance to them all; and might be removed by the same rule of Law that allows a man to abate a Rusance. Alhereupon Judgment was given for the Defendant, Nisi causa, &c.

Anonymus.

Ction fur le Case: The Plaintist veclares, that whereas the Cellatoz of the Defendant was endebted to the Plaintiff at the time of his death in the sum of 121. 10s. that the Defendant in confideration of fogbearance, promifed to pay him 5 l. at such a time, and 5 l. moze at such a time after, and the other 50 thillings when he thould have received money; then avers, that he did forbear, ec. and faith, that the Defendant paid the two five pounds; but for the 50 thilllings relidue, that he hath received money, but hath not paid it. The Defendant pleaded non Assumplit, which was found Wilmor moved in arrest of Judgment, that against him. the Plaintiff doth not fet forth how much money the Defendant had received, who perhaps had not received so much as 50 thillings; he faid, though the promife was general, pet the breach ought to be lato fo, as to be adequate to the confiveration. And fecondly, that the Plantiff ought to have let forth of whom the Defendant received the money, and when and where, because the receit was traversable. The Court agreed, that there was good cause to demur to the Declaration: but after a Aerdia they would intend, that the Defendant had received 50 thillings; because else the Jury would not have given to much in damages: and for the other exception, they held, that the Defendant babing taken the general issue, had waibed the benefit thereof.

Alford & Tatnell.

Regory & Melchisedec Alford were bound soyntly to T Tatnell in a Bond of 700 l. the Obligee brought several Actions, and obtained two feveral Judgments in this Court against the Obligors; and sued both to an Outlawry. And in Mich. Term. 18 Car. 2. both were returned outlawed. In Hill. Term following, Gregory Alford was taken upon a Cap. utlagatum by Browne Sheriff of Dorset-shire; who voluntarily luffered him to escape. Tatnell brought an Action of Debt upon this escape against Browne, and recover'd and receiv'd latisfaction: notwithstanding which he proceeded to take Melchisedec Alford: who brought an Audita querela: and fet forth all this matter in his Declaration; but upon a demurrer, the Opinion of the Court was against the Plaintist for a fault in the Declaration, viz. because the satisfaction made to the Plaintiff by the Sheriff, was not specially pleaded, viz. time and place alledged where it was made, for it is issuable, and for ought appears by the Declaration, it was made after the Wirit of Audita querela purchased, and before The Court faid, if Tatnell had only the Declaration. brought an Action on the case against the Sherist, and recovered damages for the escape, though he had had the damages paid, that would not have been lufficient ground for the Plaintiff here to bying an Audita querela; but in this case he recovered his Diginal debt in an Action of debt grounded upon the elcape, which is a lufficient ground of Action, if he had beclared well. They gave day to show cause, why the Declaration hould not be amended, paying Coffs.

Anonymus.

AN Action of False Imprisonment. The Defendants justifie by vertue of a Marrant out of a Court within the
County Palatine of Durham; to which the Plaintiff demur'd.
The material part of the Plea was, That there was antiqua
Curia tent. coram Vicecomite Comitatus, &c. vocat. The
County

Tounty Court, which was accustomed to be held de 15 diebus in 15 dies, and that there was a Custom, that upon a Alrit of questus est nobis, issuing out of the County Palatine of Durham, and delivered to the Sherist, &c. that upon the Plaintists assirming quandam querelam against such person og persons, against whom the questus est nobis issued, the Sherist used to make out a Alrit in the nature of a cap. ad satisfac. against him of them, &c. that such a Alrit of questus est nobis issued ex Cur' Cancellarii Dunelm. which was delivered to the Sherist, who thereupon made a precept to his Baylists to take the Plaintist, who thereupon was arrested, which is the

came imprisonment.

Serjeant Jones for the Plaintiff, took exceptions to this plea; as, 1. The Court is ill pleaded to be held coram Vicecomite; for in a County Court the luitors are Judges: Cr. Jac. 582. and though this Court holdeth plea upon a questus est nobis, which is the Kings Writ; pet that doth not alter the nature of the Court, not its Jurisdiction. Jentleman's case, 6 Rep. 1 1. 2. The Custom of holding this Court de quindecem diebus in quindecem dies, is boid: being not only against Magna Cart. 35. but against the 2 & 3 Edw. 6. cap. 25. which enacts, That no County Court, &c. shall be longer deferred then one month from Court to Court, &c. any Usage, Custom, Statute or Law to the contrary notwithstanding. 3. De took these erceptions to the Custom; 1. It is ablurd, that if upon a queftus eft nobis, the party affirm quandam querelam, that then, ec. for a questus est nobis is an Action upon the case, and this quædam querela may be in any other Action, though never fo remote: the plaint ought to be in pursuance of the Wirit, and so to have been pleaded. 2. As this Custom is laid, it does not appear, that the plaint ought to arife within the Jurisdiction of the Court. 3. It is against the Law, that in any inferiour Court a Capias should be awarded befoze Summons. 1 Rolls 563. Seaburn & Savaker. 2 Rolls 277. placit' 2. Pasch. 16 Jac. The 4th exception to the Declaration Bankes & Pembleton. was, that it does not appear whether this Writ were purchased out of the Chancery of the City of Durham, og of that of the County: the words ex Cur. Cancellar Dunelm. are applicable to either. 5. Here is not an averment, that the cause of Action did arise within the County Palatine: it is said indeed, that he was endebted, and did assume within the County; but it is the contract and cause of the debt that entitles the Court there

there to the Action. 6. De says, that he did levare quandam querelam; but does not say that it was super brevi de questus est nobis: not that it was in placito prædict'; not makes any application at all of the plaint to the Writ: and then the plaint not appearing to be warranted by the Wirit, and being for above 40 shillings, the proceedings are coram non Judice. 7. The Sheriffs Warrant is to Arrest , si inventus fuerit in balliva tua: and it does not appear that the Bapliff had any Bayliwick. If the County were divided into several divisions, and each Baylist allotted to a several division, this ought to have been thown; and that the place where this Arrest was made, was within this Baylists proper division. 8. Df the Defendants own Mowing, the Court was not held according to the Custom alledged, viz. de quindecim diebus in 15 dies: for the last Court is said to have been held the 12th of March, and the next after that on the 26th. Turner for the Defendant argued, that the implifonment was lawful. To the first exception he said, that the Court mention'd in the bar, is not a County-Court, not so pleaded: it is pleaded as it is, Cur' vocat. Cur' Comitat'; and there were never any Suitors known there to be Judges. It is not to be examined according to the rules of County Courts properly so called: for we plead it to be according to the Custom of the County Palatine of Durham, which is an exempt Jurisdiction. As for the exception to its being held de 15 diebus in 15 dies, the answer to the first exception answers this also. The Judges of Assize in Wirits of falle Judgment have allowed this Custom, and affirm'd Judgments given in this Court: of which we have many Presidents. For the third exception, concerning the validity of the Custom; to the first exception against it, he ans fwered, that a Bar is good enough, if it be to a common intent, and the common intent is, that the quædam querela must be pursuant to the questus est nobis: and in this case it was so; the questus est nobis, and the precept upon which the Plaintiff was arrested, are both in an Action of the case upon a promife. And to the fecond, that the cause of Action is shown to arise within the Auxisdiction; for the promise, which is the ground of this action, is faid to have been made infra Comitat. Palatin. To the third exception, that in inferiour Courts it is illegal to award a Capias before Summons; but this Court is in a County Palatine; and fuch Courts are like to the Courts at Westminster, and have the same Authority: Rowlandson

landson & Sympson, I Rolls 801. placito II. and the Customs of those Courts are as good Alarrants so their proceedings, as the Custom of the kings Bench is so, their issuing Latitats. To the fourth, he said it was a foreign intendment, to suppose a Court of Chancery in the City of Durham; a Court of Equity cannot be by grant, and there is no prescription in the City of Durham, to hold plea in Equity. To the sifth, he said, the promise was said to have been made within the Jurisdicion. To the sixth, ut supra. To the seventh, that this Precept was according to the form of all their Precepts in like cases. To the eigth, that taking both days inclusively, there are 15 days. But admitting that there were some defect in the proceedings, yet since that Court can issue such a Alrit as this is, it is sufficient to excuse the Officer: 10 Rep. the case

of the Warshalley.

Cur'. This is not a County Court, but a Court vocat' Cur' Com', and it is within a County Palatine; and for both those reasons not in the same degree with other County Courts. And though it were a County Court, it might by prescription be held befoze the Sheriff, as a Court Baron may by a special prescription be held coram Seneschallo, and so it hath been adjudged: in the case of Armyn & Appletoft, Cr. Jac. 582. there is no luch special prescription as there ought to be, but a general prescription for a Court Baron, and every Court Baron must be prescribed for. The County Palatine of Durham is not of late flanding, like that of Lancaster, but is immemorial: and a Custom there is of great Authority, objection against quandam querelam; why it may not be as altowable for a man there to bring a questus est nobis, and beclare in what plaint he will, as it is here to arrest a man and declare against him in any Action? But admitting the proceedings tregulat, yet fince the Court can issue a Capias, that excuses the Officer in this Action: and Judgment was given for the Defendant, Nisi causa, &c.

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Term. Pasch. 26 Car. II. in Communi Banco.

Brooking versus Jennings & alios.

De Plaintiff declared as Executor against the Defendants, as Executors allo; they pleaded febetally plene administravit. Apon one of the Iffues a Special Merdict was found; viz. that the faid Defendant being Executor durante min' ætate of an Infant, had paid such and such Debts and Legacies, and had belivered over totum refiduum status personalis of the Testator, to the Infant Executor, when he came of Age. Justice Atkyns. This special Aerdic does not maintain the Defendants plea of fully administred: for that cannot be pleaded, unless all Debts, ec. are discharged, as far as the Assets will reach: which is not done here; for residuum status personalis is delfvered over, ec. and that reliduum is lyable to the payment of But Vaughan, this Debt, which is yet undischarged. Wyndham and Ellis held, that however an Erecutor discharge eth himself of the Estate that was the Testators, he may plead fully administred: and that it is his lafest plea.

It was found by the same Aerdic, that the Testatoz lest a personal Estate, to the value of 2000 l. that there were owing by him 500 l. in Debts upon specialties, 500 l. moze upon simple Contracts; and that he had disposed of 400 l. in Legacies: and that this Desendant was Executoz durante minor' of the Testatozs Son; that he had paid 1400 l. in discharge of the Debts and Legacies asozesaid; and had accounted with the Insant Executoz, when he came of age, and that upon the payment of 91 l. to him, the Insant Executoz released to him all Actions, &c. and whether upon this whole matter, this Desendant should be said to have administred,

Vaughan. IChen an Infant Executor comes of age, the power of an Executor durante minore state ceaseth; and the new

new Executor is then lyable to all Actions: if the former Executor wasted, the new one hath his remedy against him; but he is not lyable to other mens Suits. Mor is there any inconvenience in this; for still, here is a person lyable to all Actions: It is objected, that possibly the new Executor is not of ability to satisfie: I answer; if in some particular case it fall out to be so, that is by accident: and to argue from the possibility of such an accident, is to suppose the Law sitted to

answer all emergencies. Atkyns accorded.

Vaughan. It is said that here are 1500! lyable to pay this Debt: for to pay debts upon simple Contracts, or Legacies before it, is a devastavit; especially, the Defendant having notice of this debt (which was also found.) That is a missake, upon which some books run: but it is certainly no Law. Debts upon simple Contracts may be paid before Bonds, unless the Executors have timely notice given them of those Bonds; and that notice must be by Action. Atkyns and Ellis agreed with Vaughan. Wyndham dubitabat. The case was put off to be argued next Trinity Term: but in the mean time the Plaint discontinued.

Scudamore & Croffing. Excb. Chamber.

Plectione firms. A special Aerdict: it was found that a man by Deed did give and grant, bargain and sell, alsen, enseoff and consirm to his daughter certain Lands: but no consideration of money is mention'd, not is the Deed envoll'd; there is likewise no consideration of natural Assection expessed (other then what's implyed in naming the Grantee his daughter) there is no Livery endotsed, not any found to have been made; not was the daughter in possession at the time of the Deed made. The question was, whether this were a void Deed, of had any operation at all in the Law, and what was wrought by it? In the Kings Bench it was adjudged by the whole Court to be a good Deed, and that it carried the Estate to the daughter by way of covenant to stand seized. Apon a Alrit of Erroz before the Justices of the Common Pleas, and the Barons of the Exchequer, the case was argued at Bergeants Inn, by Sir William Jones against the Deed,

and by Sir Francis Winnington in maintenance of it. Jones. Before the Statute of Ales, a man might either have retained the possession, and have departed with the use, oz he might have departed with the possession, and have retain: ed the use; of he might have departed with them both together. The Statute unites the possession to the use; but leaves men at liberty to convey their Estates by putting the possess. on out of themselves, and limiting an use; or by raising an use, and let the possession follow that. Row how thall it be known when an Estate must pals one of these ways, and when the other? That must appear by the intention of the party expressed in the Deed. Some Conveyances contain words that look both ways; some one way and some another. If the words look both ways, then has he, to whom the Estate is intended to be conveyed, election to take it whether way he likes best : Sir Rowland Heyward's case, 2 Rep. Adams & Steer, 2 Cr. 210. so in Mich. 9 Jacob. a man in consideration of money did grant, enfeoff, bargain and fell; and in the deed there was a Letter of Attomey to make Livery; refolved, to be a good Conveyance by way of bargain and fale, if the deed were envolled: Rolls second part 787. Where the words are only proper to pals an Estate by way of use, there pou shall never take an Esfate at Common Law: Cr. Jac. 210. in Adams & Steer's case: Denton & Fettyplace's case. 30 Eliz. is there cited, that by the words of bargain and fale without attornment, a Reversion passeth not. Vide ibid. 50. Dr. Atkyns case: The King bargains and sells, ac. no use can rife, because the King cannot stand leized to an use: Moor 113. On the other side, where the words are proper to pals the Effate at Common Law, there nothing shall pals by way of use: Dyer 302. b. a quære is there made, whether or no, if a man, in confideration of natural affection, ec. reteale to his brother, who is not in possession; whether an use bereby artieth to the relevee? but this Quare is resolved in a manuscript Report that I have of that case, viz. That no use Does arife. De cited Ward & Lambert's cafe: Cr. Eliz. 394. & Osburn & Churchman's case, Cr. Jac. 127. which is the case in question. In Rolls second part, fol. a man in considera: tion of marriage did give and grant to his wife after his decease, to her and the heirs of her body, ac. and it was resolved that nothing passed. This case is much stronger then ours: for there is but one way to make this good, viz. by railing an

use:

use: for as a Conveyance at Common Law, it cannot be good, because a free hold cannot be granted to commence in futuro: and pet rather then recede from the words of the party, the deed was adjudged to be vold. De cited Foster & Foster's case, Trin. 1659. which himself had argued. In the beed here in question there are words proper to pals an Estate in possession; give and grant. There is likewise a clause of warranty; of which the Grantee Mould lofe the benefit in a great measure, if he were in the Post; for then he shall not bouch: and there are Opinions that he cannot rebut; as in Spirt & Bence's case. There is also a Covenant, that after the fealing and belivery, and due execution of, &c. the party thall quietly enjoy, ac. now, what execution can be meant, but by Livery of seisin? Foxe's case, 8 Rep. has been objected, in which it is resolved, that the Reversion in that case should pass by way of bargain and fale, though the words of grant were, demise, grant, set and to Farm let; all words proper to a Common-Law-Conveyance: I answer, the consideration of money there expelled, is folkrong a confideration, as to carry it that way; but the confideration of natural Affection is not fo firong; and so the cases are not alike: the consideration of money has been held to fitting, as to carry an Effate of fee fimple in an use, without words of Inheritance.

Winnington contra. De intiffed upon the intention of the party, the confideration of blood and natural affection, and the necessity of making this deed good by way of Covenant to fand feized, because it could not take effect any other way. The clause of warranty and covenant for quiet enjoyment, he faid, were but forms of Conveyances, and words of Clerks: but the effectual words are those that contain the inducement of the party to make the Conveyance, and the words that pals the Estate: he cited Plowd, queries placito 305. Rolls 2 part, 787. placito 25. I Inft. 49. Poph. 49. in Fosters case, which bad been cited against him, he said, the deed was as unformal to pass the Estate one way as another. In Osburn & Churchman's case, he said, this point was farted; but that the resolution was not upon this point: it came in question neither upon a special Clervict, noz a demurrer. Tibs & Purplewell's cafe, 40 & 41 Eliz. Rolls 2 part 786, 787. answers all Dbiections against our case, and is in form and substance the same with it. De cited one Saunders & Savin's cafe, adjudged in the

late times in the Common-Pleas, viz. That where a man feiz'd in fee of a Rent-charge, granted it to a Kinsman foz life; and the grantoz dyed befoze attoznment, it was resolved, that upon the seasing and delivery of the deed an use arose. Wherefoze he prayed that the Judgment might be affirmed.

Turner Chief Baron of the Exchequer, Turner and Littleton Barons, and Atkyns, Wyndham and Ellis Justices of the Court of Common Pleas, were for affirming the Judgment. Vaughan Chief Justice of the Common Pleas, and Thurland

puisne Baron contra.

The fir Judges argued, 1. That in a Covenant to fland feized, those words of covenanting to stand seized to the use of, &c. are not absolutely necessary, and that it is sufficient if there are words that are tantamount. 2. That no Conveyance admits of such variety of words, as does this of a Covenant to fand leized. 3. That Judges have always endeaboured to support Deeds, ut res magis valeat, &c. 4. That the grantoz in this case by putting in plenty of wozds, shews that he did not intend to the himself up to any one lost of Conveyance. 5. That if the words give and grant had been alone in the deed, there would have been no question: and that if so, then utile per inutile non vitiatur. 6. That every mans deed must be taken most strongly against himself. 7. That the words give and grant enure cometimes as a grant, cometimes as a Covenant, fometimes as a Releafe: and must be taken in that sense which will best support the intent of the party. 8. That the very point of this case has received two full determinations upon debate: and that it were a thing of ill consequence to admit of so great an uncertainty in the Law, as now to alter it. 9. That there is here a clear intent that the daughter hould have this Effate, a Deed, a good confideration to raise an use, and words that are tantamount to a Covenant to fland feized. Alberefoze the Judgment was affirm'd.

Thurland said, The intention of the party was not a sure rule to construe deeds by: that if Lands were given in connubio soluto ab omni servitio, the intent of the giver is, to make a gift in Frank-marriage; but the Common Law, that delights in certainty, will not understand his words so, because he does not say, in libero maritagio: In our case, the first intent

tent of the Father was to fettle the Land upon his Daughter; his fecond intent was to do it by such of such a Conveyance: what Conveyance he meant to do it by, we must know by his words: the words give and grant do generally and naturally work upon something in este: strained constructions are not favoured in the Law. Mor ought beirs to be disinherited by forced and strained constructions. If this Deed shall work as a Covenant to stand seized, it will be in vain to study forms of Conveyances; it is but throwing in words enough, and if the Lands pass not one way, they will another. De cited Crook 279. Blitheman & Blitheman's case. And 34 & 35 Dyer 55 he said Pitsield & Pierce's case in March, was later then that of Tibs & Purplewell, and of better Authority.

Vaughan accordant. It is not clear that the woods give and grant are sufficient to raise an use; but supposing that they are by a forced Exposition, when nothing appears to the contrary; will it thence follow that they may be taken in a sense directly contrary to their proper and genuine sense, in such a place as this, where all the other parts of the deed are whosly inconsistent with, and will not by any possibility admit of such a construction? he mentioned several clauses in the deed, which he said were proper only to a Conveyance at Common Law. De appealed to the Law before the Statute of Ales; and said, that where an use would not rise by the Common Law, there the Statute executes no possession: and that by such a deed as this no use would have risen at the Common Law: but the Judgment was affirmed.

Gabriel Miles bis Case.

He and his Mise recovered in an Action of Debt against one Cogan 200 l. and 70 l. damages: the Mise dies, and the Husband pays to have Execution upon this Judgment. The Court, upon the first motion, enclin'd that it should not survive to the Husband; but that Administration ought to be committed of it, as a thing in Action: but this Term they agreed that the Husband might take out Excution; and that by the Judgment A a 2

it became his own bebt, due to him in his own right. And accordingly he took out a Scire facias: Beaumond & Long's case, Cr. Car. 208. was cited.

Anonymus.

De Plaintiff in an Ejectione firme declares upon a Leafe made the tenth day of October, habend' from the zoth of November to fibe years. And the question upon a special Clerdid was, whether this were a good or a bott Leafe? Serjeant Jones. There are many takes in which the Law rejeas the limitation of the commentement of a Leafe, if it be impossible; as from the 31st of September, of the like: now this being altogether untettain, and fince there is nothing to be teemine pour Judgments what November he meant, whether last-patt, of next-ensuing, it amounts to an imposible limitation. Rolls, tit. Eftate, placito 7. 849. ibid. placito 10. be-twict Elmes & Leaves. Baldwin contra. The Law will reject an impossible limitation, but not an uncertain limitation. Vaughan & Atkyrs. The Law rejects an imposible limitation. because it cannot be any part of the parties agreement & but an uncertain limitation bitlates the Leale ; because it was part of the agreement: but we cannot vetermine it, not knowing how the Contract was. There are many examples of Leales being boid for uncertainty of commencements: which could not have been adjudged boid if the limitation in this case were good. Wyndham & Ellis contra. And that it sould begin from the time of the velivery. It was moved afterward, and Ellis being ablent, it was ruled by Vaughan & Atkyns against Wyndham's Poinion, and Judgment was arreffeb.

11 30 1

Fowle & Doble's Cafe.

Ormedon in the Remainder. The case was thus: There were this Siffers; the eldeft was Tenant in Tail of a fourth part of 140 Acres, ac. in the Willes, A. B. & C. the Remainder in Fee-simple to the other two: the Tenant in Tail takes busband Dr. Doble the Defendant. The husband and Wife leby a fine fur conisance de droit, to the use of them two, and the heirs of the body of the Wife, the Remainder in fee to the right Deits of the busband : and this fine was with warranty against them and the heirs of the wife. wife vies without issue, living the Dusband, against whom Lucy and Ruth, the other two Sifters, to whom the Remainber in fee was limited, bring a Formedon in the Remainder. The Defendant, as to part of the Lands in Demand, viz. 100 Acres, pleaded Non-tenure, and that fuch a one was Tenant. To that plea the Plaintiff Demucced. As to the reft of the Lands, he pleaded this fine with warranty. The Plaintiffs mave a frivolous replication, to which the Defendants Demurred. The Plaintiffs Councel excepted to the Defendants plea of Non-tenure: 1. That he does not expect in which of the Ciffles the 100 Acres lie: 5 Ed. 3. 140. in the old Print, 184. & 33 H. 6. 51. Sir John Stanley's cafe. But this was over-ruled: for the formedon being of to many leveral Acres. he is not obliged to thew where those lie, that he pleads Nontenure of: be tells the Plaintiff who is the Tenant, which is enough for him. 2. Because he that pleads Non tenure in abatement, ought to let forth who was Cenant die impetrationis brevis orig. &c. But this was over-ruled also; for he says that himself was not Tenant die impetrationis brevis origin. but that fuch another eodem die was Tenant; which is certain When the Tenant pleads Non-tenure to the whole, he needs not let forth who is Tenant, otherwise when he pleads Non-tenure of part: 11 H. 4. 15. 33 H. 6. 51. At the Common Law, if the Tenant had pleaded Non-tenure as to part, it would have abated all the carrit: 36 H. 6. 6. but by the Statute of the 25 Ed. 3. cap. 16. it was enacted, that by the exception of Non-tenure of parcel, no Writ should be abated, but only for that parcel, whereof the Non-tenure was alledged. A third exception was taken to the pleading of the

Fine, viz. because he pleaded a fine levied of a fourth part, without faying in how many parts to be divided. This was also over-ruled, and I Leon. 114. was cited; where a difference is taken betwirt a Writ and a fine: and in a fine it is faid to be good, that being but a common affurance, aliter in a Writ: 19 Ed. 3. Fitz. bre 244. This exception feems level'd against the Plaintiffs own Writ, in which he demands a fourth part, without faying in how many parts to be divi-The matter in Law was, whether of no this warranty, being against the husband and wife, and the heirs of the wife, were a bar to the Plaintiffs, of furvived to the Busband? and it was refolved to be a bar; for this warranty as to the bufband, was destroyed as soon as it was created: the same breath that created it put an end to it: for the Dusband warranted during his life only, and took back as large an Effate as he warranted; which destroys his warranty: and this is Littleton's Text: if a man make a feofiment in fee with warranty, and take back an Estate in fee, the warranty is gone. But the destruction of the husbands warranty does not affect the wives: 20 H. 7. 1. and Sym's case; upon which Ellis said, he much relyed. Herberts case 3 Rep. can give no rule here; for that here the husband is feiz'd only in right of the wife.

Vaughan said, That if the fine in this case had been levied to a ftranger for life, or in fer, who had been impleaded by ano. ther ftranger; that in that case the Tenant ought to have bouched the surviving husband, as well as the heir of the wife, or else he would have lost his warranty. 2. De faid, if the Fine had been levied to the use of a Aranger, who had been impleaded by the heirs of the wife, he questioned whether of no the Tenant could have rebutted them for any more then a mosty: and he questioned the resolution of Sym's case 8 Rep. there is a Case cited in Symme's case out of the 45 Edw. 3. 23. which is express against the resolution of the case: it is said in the Reports, that no Judgment was given in that case, which is falle; and that the case is not well absidated by Brook, which is also false. If in case of a boucher, a man loseth his warranty, that does not bouch all that are bound; why should not one that's rebutted have the like advantage? There is a resolution quoted in Sym's case out of 5 Edw. 2. Fitz. tit. garranty 78 upon which the Judgment is faid to be founded, being, as is there faid, a cafe in point; but he conceived not: for Harvey, that gave the rule,

faid :

fait; le tenant poit barrer vous touts, ergo un fole: in the cafe there were feveral co-heirs, and if all were bemandants, all might have been barred; and if one be demandant, there's no queffion but the may be rebutted for ber part. But Sym's case is quite otherwise: for there one person is co-heir to the garranty, that is not heir to any part of the Land. In 6 Ed. 3. 50. there is a case resolved upon the ground and reason of the 45 Ed. 3. for these reasons he said, he could not rely upon Sym's case. De agreed with the rest to the reason why the warranty is destroyed, viz. because the husband takes back as great an Effate as be warranted: fog then no ule can be made of the warranty. If a man that has Land, and another, warrant this Land to one and his heirs : and one of them die without heirs, the survivoz may be vouched without question. The husband never was obliged by this warranty; but as to him it was meerly nominal: for from the very creation of it, it was impossible that it should be effectual to any purpose: he cited Hob. 124. in Rolls & Osburn's case. The whole Court agreeing in this Opinion, Judgment was given for the Tenant.

Term.

Term. Trin. 26 Car. II. in Communi Banco.

Hamond versus Howell, &c.

he Plaintiff brought an Action of Falle Imprisonment against the Mayor of London and the Recorder, and the whole Court at the Old-bally, and the Sheriffs and Gaoler, for committing him to prison at a Sections there held. The case was thus: some Quakers were indicated for a Riot, and the Court directed the Jury, if they believed the Evidence, to find the Prisoners guilty; for that the Fact (worn against them was in Law a Riot: which because they resused to do, and gave their Aerdia against the direction of the Court in matter of Law, they committed They were afterwards discharged upon a Habeas Corthem. And one of them byings this Action for the wrongful Commitment. Bergeant Maynard moved foz the Defendants, that they might have longer time to plead: for a rule had been made that the Defendants should plead the first day of this Term. The Court declared their Opinions against the Action, viz. That no Action will lie against a Judge for a wongful Commitment, any more then for an erroneous Judgment. Munday the Secondary told the Court, that giving the Defendants time to plead countenanced the Action, but granting imparlances did not. So they had a special imparlance till Michaelmas Term next. Atkyns. It was never imagined, that Juffices of Oyer and Terminer and Gaol-delivery would be questioned in private Actions, for what they fould to in Execution of their Office; if the Law had been taken to, the Statute of 7 Jac. cap. 5. for pleading the general Issue, would have included them as well as Inferiour Mfficers.

Birch & Lake.

A Probibition was granted to the Spiritual Court upon this Auggestion, that Sir Edward Lake Aicar-general, had cited the Plaintist ex officio to appear and answer to divers Articles. The Court said, that the citation ex officio was in use, when the Dath ex officio was on foot: but that is oussed by the 17th of Eliz. If Citations ex officio were allowed, they might cite whole Counties without Presentment; which would become a trick to get money. And the party grieved can have no Action against the Aicar-general, being a Judge, and having Jurisdiction of the cause, though he missake his power. Per quod, &c.

Anonymus.

Aron & Feme Administrators in the right of the Feme, bring an Action of Debt against Baron & Feme, Abmimistrators likewise in the right of the Feme, de bonis non, &c. of J. S. The Action is for Kent incurred in the Defendants ofon time, and is brought in the debet & detinet. The Defen-Dants plead, fully administred: to which the Plaintiffs Demurred. Seri. Hardes for the Plaintiff fair, the Action was well brought in the debet & detinet, for that nothing is Affets, but the profits over and above the value of the Rent : he cited Hargrave's case, 5 Rep. 31. 1 Rolls 603. 2 Cro. 238. Rich & Frank. ibid. 411. ibid. 549. 2 Brook 202. 1 Bulftr. 22. Moor 566. Poph. 120. though if an Executor be Plaintiff in an Action for Rent incurred after the Teffators Death, he mult fue in the detinet only, because whatever he recovers is Asiers: but though an Executor be Plaintiff, pet, if the Leale were made by himfelf, he must sue in the debet & detinet. Then, the plea of fully administred, is not a good plea: for he is charged for his own occupation. If this plea were admitted, he might gibe in evidence payment of Debts, ac. for as much as the term is worth, and take the profits to his own use, and the Lessoy be fript of his Rent: in Styles Reports, 49. in one Josselyn's cafe, this plea was ruled to be ill. And of that Opinion the Court 25 11

was: and faid, that Executors could not waive a Term (though if they could, they ought to plead it specially) for it is naturally in them, and prima facie is intended to be of more value then the Rent: if it should fall out to be otherwise, the Executors shall not be lyable de bonis propriis, but must aft themselves by special pleading. For the plea, they said there was nothing in it: and gave Judgment sor the Plaintiss.

Buckly & Howard.

Ebt upon two Bonds, the one of 201. the other of 401. against an Administratrix: the Defendant pleaded, that the intestate was endebted to the Plaintist in 2501. upon a Statute Merchant : which Statute is pet in force, not cancel'd noz annull'o: and that the has not above 40 shillings in Assets, befides what will fatisfie this Statute. The Plaintiff replies, that the Statute is burnt with fire. The Defendant demurs. and by the Opinions of Wyndham, Atkyns & Ellis, Juffices, the Plaintiff had Judgment. For the Defendant by his demurrer has confessed the burning of the Statute: which being admitted and agreed upon, it is certain that it can never rife up against the Defendant: for the Stat. of the 23 Hen. 8. cap. 6. concerning Recognifances in the nature of a Statute-Staple, refers to the Statute-Staple, viz. that like Execution shall be had and made, and under fuch manner and form as is therein provided: the Statute-Staple refers to the Statute-Merchant: and that to the Statute of Acton Burnel, 13 Ed. 1. which provides, that if it be found by the Roll, and by the Bill, that the Debt was acknowledged, and that the day of payment is expired, that then, ac. but if the Statute be burnt, it cannot appear that the day of payment is expired; and confequently there can be no Execution. If the Recognisee will take his Action upon it, he must say, hic in Cur' prolat. 15 H. 7. 16. Vaughan differ'd in Opinion: he faid, 1. That it is a rule in Law, that matter of Record shall not be aborded by matter in pais; which rule is manifestly thwarted by this resolution. he faid, it was a matter of Record to both parties; and the Plaintiff could not avoid it by such a plea, any moze then the Defendant could avoid it by any other matter of fact. De cited a case, where the Obligee voluntarily gave up his Bondto the Obligor, and took it from him again by force, and put it in suit: the Defendant pleaded this special matter, and the Court would not allow it: but said, he might bring his Action of Trespass. 2. Suppose the Defendant had taken issue upon the Statutes being burnt, and it had been found to have been burnt; and yet had been found afterwards, the Defendant could not have any benefit of this Aerdic. He said it was a proper case for Equity.

Slater & Carew.

Ebt upon a Bond. The Condition was, that if the Obligoz, his heirs, Executozs, ac. Do yearly and every year, pay or cause to be paid to Tho. and Dor. his wife during their two lives, that then, ec. the husband dies, and the question was, whether or no the payment should continue to the Wife ? Serjeant Baldwin argued, that the money is payable during their lives and the longer liver of them: he cited Brudnel's case 5 Rep. and 1 Inst. 219. b. that whenever an Ins terest is secured for lives; it is for the lives of them and the longer liver of them: and Hill's case adjudged Pasch. 4 Jac. Rot. 112. in Warburton's Reports. Seyle contra. The interest of this Bond is in the Obligee; the Dusband and Wife are strangers, and therefore the payment ceaseth upon the death of either of them: and of that Opinion was the whole Court; and grounded themselves upon that distinction in Brudnel's case, betwirt where the Cestuy que vies have an interest, and the cales of collateral limitations. They laid allo, that in some cales an interest would not survive, as if an Office were granted to two, and one of them dyed, unless there were words of Survivositip in the Grant. So the Plaintiff was barred.

Bb 2 Term.

Term. Mich. 26 Car. II. in Communi Banco.

Farrer & Brooks Administrat. of Jo. Brooks.

The Plaintiff had Judgment in Debt against John Brooks the intestate: and took out a Fieri facias, bearing teste the last day of Trin. Term, de bonis & catallis of John Brooks: before the Execution of which carrit John Brooks dies, and Eliz. Brooks administers: the Sheriffs Bayliff executes the Writ upon the Intellates Goods in her hands. Apon this Serjeant Baldwin moved the Court for Reffitution : for that a Fieri facias is a Commission, and must be strictly pursued. Row the words of the Wirit are de bonis of John Brooks: and by his beath they cease to be his The Plaintiff will be at no weivoice; the Goods will fittl remain lyable to the Judgment; only let the Erecution be renewed by Scire facias, to which the Administratress may plead fomewhat. Wyndham. The property of the Goods is so bound by the Teste of the Wirit, as that a Sale made of them bona fide thall be avoided: which is a stronger case. And fince the Intestate himself could not have any plea, why should we take care that the Administrator should have time to plead? And of that Opinion was all the Court, after they had addiced with the Judges of the Kings Bench: who infozmed them that their marice was accordingly. But Vaughan fair, that in his Opinion it was clearly against the rules of Law. But they faid there were cases to this purpose in Cr. Car. Rolls. Moor, &c.

Liefe & Saltingstone's Case.

Jed' firma. The cale upon a special Clerofit was thus, viz. Sir Rich. Saltingstone being feized in fee of Rees-Farm, on the 17th day of Febr, in the 19th year of the King, made his 771ill in writing, in which were thele words, viz. for Rees-Farm in fuch a place, I will and bequeath it to my Wlife during her natural life: and by her to be disposed of to such of my Children as the shall think fit: Sir Richard dyed: his Wife entred and fealed fuch a Writing as this, viz. Omnibus Christi fidelibus, &c. Noveritis, that whereas my Dusband Sir Richard Saltingstone, &c. reciting that clause in the Will: 3 Do Dispose the fame in manner following; that is to fap, I dispose it, after my beceale, to my Son Philip and his heits fog eber. The Wife bied, and Philip entred and dyed, and left the Leffor of the Plaintiff his Son and heir. The question was, what Effate Philip took? og what Effate the Teffatog intended thould pals out of him? This cale was argued in Eafter-Term last past, by Serjeant Scroggs for the Plaintist; and by Serjeant Waller for the Defendant : and in Trinity-Term by Serjeant Baldwin for the Plaintiff, and Serjeant Newdigate for the De-They for the Plaintiff infifted upon the word difpole; that when a man devileth his Land to be disposed by a franger, it has been always held to be a bequeathing of a fetfimple, og at least a power to dispose of the fee-simple. 19 H. 8. 10. Moor 5 Eliz. 57. per Dyer, Weston & Welshe: but they chiefly relyed on Daniel & Uply's case in Latch.

The Defendants Councel urged, that the heir at Law ought not to be disinherited without very expects words. That if the Deviloz himself had said in his Will, I dispose Rees-Farm to Philip; that Philip would have had no moze then an Estate soz life: and what reason is there, that the disposal being simited to another, should carry a larger Interest, then if it had been executed by the Cestatoz himself? This Term it was argued at the Bench, and by the Judgments of Ellis, Wyndham & Atkyns Justices, the Plaintist had Judgment: they agreed that the Wisecook by the Will an Estate soz her own life, with a power to dispose of the Fee. She cannot take a larger Estate to her self by implication, then an Estate soz life; because an Estate soz life is given to her by express st-

mitation:

mitation: 1 Bulft, 219, 220. Whiting & Wilkins case. cases resembling the case inquestion were cited, 7 Ed. 6. Brook, tit. Devise 39. 1 Leon. 159. & Daniel & Uply's case: & Clayton's case in Latch. It is objected that in Daniel & Uply's case, there are these words, at her will and pleasure: to which they answered, that if she have a power to dispose according to her discretion, and as the her self pleaseth; and then expressio eorum quæ tacite insunt, nihil operatur. If I devile that J. S. thall fell my Land, he thall fell the Inheritance: Kelloway 43, 44. 19 H. 8. fol. 9. Where the Devilor gives to another a power to dispose, he gives to that person the same power that himself had. Vaughan Chief Justice Differed in Opinion; he faid, it is plain that the word dispose voes not signific to give, for if to, then it is evident that the Leffor of the Plaintiff cannot have any title: for if the Wife were to nive. then were the Estate to pals out of her, which could not be by fuch an appointment as the makes here, but must be by a legal Conveyance. Belides, the cannot give what the has not, and the has but an Effate fog life. If then it does not fignifie to give, what does it fignifie? let us a little turn the words, and a plain certain fignification will appear: I will and bequeath Rees-Farm to such of my Children as my Wife shall think fit, at her disposal: at this rate the Wife does but nominate what person shall take by the will. This is a plain case, and free from uncertainty and ambiguity, which else the word dispose will be liable to. But Judgment was given, ut fupra.

Howell versus King.

Respass, so diving Cattel over the Plaintiss ground. The case was; A. has a way over B's ground to Blackacre, and dives his Beasts over A's ground to Blackacre, and then to another place lying beyond Blackacre. And whether this was lawful of no, was the question upon a demurrer. It was urged, that when his Beasts were at Blackacre, he might drive them whither he would: Rolls 391. nu. 40. 11 H. 4. 82. Brook, tit. chimin. On the other side it was said, that by this means the Desendant might purchase a hundred

of a thousand acres adjourning to Black-acre, to which he prescribes to have a way: by which means the Plaintiss would lose the benefit of his Land: and that a Prescription presupposed a grant, and ought to be continued according to the intent of its original Creation. The whole Court agreed to this. And Judgment was given for the Plaintiss.

Warren qui tam, &c. versus Sayre.

De Court agreed in this cale, that an Information for not coming to Church, may be brought upon the State of 23 Eliz. only, reciting the clause in it that has reference to Stat. 1. of the Queen: and that this is the best and surest way of declaring.

Term.

Term. Hill. 26 & 27 Car. II. in Com. Banco.

Williamson & Hancock.

Hill. 24 & 25 Car. 2. Rot. 679.

Enant for life, the Remainder in Cafl. Tenant for life levies a fine to J. S. and his heirs, to the use of himfelf for years, and after to the ufe of Hannah and Susan Prinne and their heirs, if such a sum of money were unpaid by the Conuloz, and if the money were paid, then to the use of the Conisoz and his heirs. And this Fine was with general warranty. The Tenant for life vied, the money unpaid, and the warranty descended upon the Remainder-man in Tail. And the question was, whether the Remainder-man were bound by this warranty or not? Serjeant Maynard argued, that because the Estate of the Land is transferred in the Post, before the warranty attaches in the Remainder man, that therefore it should be no Bar. De agreed, that a man that comes in by the limitation of an use thall be an Assignee within the Statute of 32 H. 8. cap. 34. by an equitable confruction of the Statute, because he comes in by the limitation of the party, and not purely by Ac in Law: but this case of ours is upon a collateral garranty, which is a politive Law, and a thing to remote from folio reason and equity, that it is not to be firetch'd beyond the maxime. That the Celtuy que use in this case thall not bouch, is confessed on all hands: and there is the same reason why he should not rebutt. De said the resolution mentioned in Lincoln Colledge case, was not in the case, noz could be: the warranty there was a particular warranty, contratunc Abbatem Westmonasteriensem & successores suos; which Abby was dissolved long befoze that case came in question. De said, Justice Jones upon the arguing of Spirt & Bence's case, reported in Cr. Car. said, that he had been present at the Judgment in Lincoln Colledge case, and that there was no such resolution as is there reported. Serjeant Baldwin argued on the other side: that at the Common Law many persons might reduct, that could not take advantage of a warranty by way of Voucher: as the Lord by Escheat, the Lord of a Aillain, a Stranger, a Cenant in possession: 35 Ass. placito 11. 42 Ed. 3. 19. b. a fortiori, he said, he that is in by the limitation of an use, being in by the act of the party (though the Law co-operate with it, to persent the assurance) shall reduct.

The Court was of Opinion that the Cestuy que use might rebutt, that though Voucher lies in pubity, an abater of its truder might rebutt. F. N. B. 135. 1 Inft. 385. As to Serjeant Maynard's Dbjection, that he is in the Post; they faid they had adjudged lately in Fowle & Doble's case, that a Cestuy que use might rebutt. So it was held in Spirt & Bence's cafe, Cr. Car. and in Jones 199. Kendal & Foxe's case. That Report in Lincoln Colledge case, whether there were any resolution in the cafe or no, is founded upon to good reason, that Conveyances fince have gone according to it. Atkyns faid, there was a Difficult clause in the Statute of Uses, viz. That all and fingular person and persons, &c. which at any time on this side the first day of May, &c. 1536. &c. shall have, &c. By this clause they that came in by the limitation of an use before that day, were to have the like advantages by Voucher of Rebutter, as if they had been within the degrees. If the Parliament thought it reasonable, why was it limited to that time? Certainly the makers of that Law intended to deffeop ales utterly, and that there should not be for the future any Conveyances to Ales. But they supposed that it would be some small time before all people would take notice of the Statute, and make their Conveyances accordingly; and that might be the reason of But fince, contrary to their expediations, ales are continued, he could easily be satisfied; he said, that Cestur que use moule rebutt. Wyndham was of Opinion, that Cefluy que use might vouch: he said there was no Authority against it, but only Opinions obiter. They all agreed for the Defendant, and Judgment was given accordingly.

Rogers versus Davenant Parson of White-Chappel.

Orth Chief Justice: The Spiritual Court may compell Parishioners to repair their Parish Church, if it be out of Repair, and may Excommunicate every one of them, till it be repaired: and those that are willing to contribute must be absolved, till the greater part of them agree to affels a Tar; but the Court cannot affels them towards it; it is like to a Bildge or a Digh-way; a Distringas thall thue against the Inpabitants, to make them Repair it : but neither the Kings Court, noz the Justices of Peace can impose a Tax foz it. Wyndham, Atkyns & Ellis accorded; The Church Wardens cannot; none but a Parliament can impole a Tar: but the greater part of the Parish can make a By-Law; and to this purpole they are a Coppopation. But if a Car be illenally impoled, as by a Commission from the Bishop to the Parlon, and some of the Parishioners, to assess a Tar; pet if it be alfented to, and confirmed by the major part of the Parishianers, they in the Spiritual Court may proceed to Excommunicate those that refuse to pay it.

Mich. 26 Car. 2. Rot. 691.

Scire facias by the Plaintiffs as Erecutors, to have Erecution of a Judgment obtained by their Testato; unde Executio adhuc restat faciend. The Defendant consesses the Judgment, but says that a Cap. ad satisf. issued against him, upon which he was taken, and was in the custody of the Marben of the fleet; and that he paid the sum mentioned in the condemnation, to the Warden of the fleet, who suffered him to go at large. The Plaintist demurred. This the Court held to be no plea; but that it was a voluntary escape in the Marben, and Judgment was given south Plaintist.

Haley's Cafe.

Per Cur. If a Habeas Corpus be directed to an inferiour Court, returnable two days after the end of the Term, pet the inferiour Court cannot proceed contrary to the Ulrit of Habeas Corpus. North cited the case of Staples, Steward of Windsor; who hardly escaped a Commitment, because he had proceeded after a Habeas Corpus delivered to him (though the value were under five pounds) and would not make a Return of it.

The King against Sir Francis Clerke.

Ent. Hill. 24 & 25 Car. 2. Rot. 594.

He cale upon a special Aerdia was thus, viz. The King being feized in fe' of the Mannoz of Leyborn in Kent, to which the Advowson of the Church of Leyborn is appendant (which Pannoz came to him by the dissolution of Ponafteries, having been part of the possessions of the Abbot of Gray-Church) granted the Mannoz to the Archbishop of Canterbury and his Successors, faving the Advowson; Afterward the King presents to the Church, being void J. S. The Archbishop of Canterbury grants the Mannor, and the Advowson, to the King, his beirs and Successors; which grant is confirmed by the Dean and Chapter: the King grants the Pannot with the appurtenances, and this Advowson (naming it in particular) which lately did belong to the Archbishop of Canterbury, and to the Abbot of Gray-Church: together with all priviledges, profits, commodities, ec. in as ample manner, as they came to the Kings hand by the grant of the Archbishop, or by colour or pretence of any grant from the Archbishop, og confirmation of the Dean and Chapter, og by furrender of the late Abbot of Gray-Church, og as amply as they are now, or at any time were in our hands, to Sir Edw. North and his heirs, &c. The question was, whether or no by this CC 2

grant the Addowson passed. Serjeant Newdigate. The King is not applied of his title, and therefore the grant boid: 1 Rep. 52. a. for he thought this Advotrson came to him by grant from the Archbishop. De cited Moor 318. Inglefields cafe. If the King be deceived in Deed og in Law, his grant is boto: Brook, Patents 104. 1 Rep. 51, 52. 1 Rep. 46, 49. 10 Rep. Arthur Legat's case. Hob. 228, 229, 230, &c. ibid. 223, 243. Dyer 124. 1 Rep. 50. Hob. 170. Moor 888. 1 Rep. 49. 2 Rep. 33. 11 Rep. 90. 9 H. 6. 28. b. 2 Rolls 186. Hob. 323. Coke's Entries 384. Serjeant Hardes contra. De laid bown four grounds of rules whereby to confirme the Kings Letters Patents: 1. Where a particular certainty precedes, it thall not be destroyed by an uncertainty, og a missake coming after 5 2 Cr. 34. & Yel. 42. 2 Cr. 48. 3 Leon. 162. 1 And. 148. 29 Ed. 3.71. b. 10 H. 4. 2. Godb. 423. Markham's case, cited in Arthur Legate's case, 10 Rep. 2. There is a difference when the King mistakes his title to the prejudice of his tenure or profit, and when he is miliaken only in some vescription of his grant, which is but supplimental, and not material noz issuable: 21 Ed. 4. 49. 33 H. 7. 6. H. 8. 1. & 38 H. 6. 37. 9 Ed. 4. 11, 12. Lane's Reports 111. 2 Co. 54. 1 Bulltr. 4. 3. Df= ffina words of relation in the Kings grant, are good to pass away any thing: Dyer 350, 351. 9 Rep. 24. &c. Whiftler's case, 10 Co. 4. When the Kings grants are upon a valuable confideration, they thall be construed favourably for the Paten. tir, for the honour of the King: 18 Ed. 1. de Quo warranto. 2 Inft. 446, 447. 6 Rep. Sir John Molyn's cafe, 10 Co. 65. a. Then be applyed all these rules to the case in question, and prayed Judgment. Afterward Serjeant Maynard argued against the passing of the Advowson. He said those two descriptions of the authomson, viz. belonging lately to the Archbishop of Canterbury, and formerly to the Abby of Gray-Church, are coupled together with a Conjunctive (et) so that both must be So here is a fallity in the first and material part of the grant, viz. the description of the thing granted: though the Advowson of Leyborn be named, pet it is so named, as to be capable of a generality: for there may be more Autowsons then one belonging to that Mannoz. This fallity goes to the title of the Church. Do subsequent words will aid this misrecital; for the description of the thing granted ends there. The following words, viz. adeo plene, &c. and whatever comes after, do but let out how fully and amply he should

enjoy the thing granted: and being no part of its description, cannot enlarge it og make it moge certain : 8 H. 4. 2. Serj. Turner contra, cited these books, viz. Bacon's Elements 96. 1 Leon. 120. Veritas nominis tollit errorem demonstrationis. 29 Ed. 3. 7, 8. 1 And. 148. Plowd. Comm. 192. 2 Co. Doddington's case. 10 Co. 113. 19 Ed. 3. Fitzherb, grants 58. 10 H. 4. 2. Sir John L'Estranges case. Markham's case 10 Co. in Arthur Legate's case. Cr. Car. 548. Ann Needler's case, in Hob. 9 H. 6. 12. Brook Annuity 3. Baker & Bacon's case, Cr. Jac. 48. & Bozoun's case, 4 Rep. 6 Co. 7. Cr. Jac. 34. 1 Leon. 119, 120. 2 Rolls, Prerog. le Roy 200. 8 Co. 167. 21 Ed. 4. 46. 8 Co. 56. Rolls, tit. Prerog. 201. 10 Co. 64. 9 Co. the Earl of Salop's case. I Inst. 121. b. Moor 421. 2 Rolls 125. This Term the Court gave their Judgment, that the Advowson did well pals. In this grant there are as large words, and the same words that are in Whistlers case 10 Rep. and the King is not here deceived, neither in the value, not in his title. And Judgment was given accordingly.

Furnis & VVaterhouse.

Twas moved for a Supersedeas to stay proceedings upon a Grand Cape in Dower, quia erronice emanavit: because the return of the Summons was not according to the Stat. of 31 Eliz. cap. 3. the Stat. is, after Summons. 2. The Land steth in a Aille called Heriock: and the Return is of a Proclamation of Summons at the Parish-Church of Halysax: and it does not appear that the Land stes within that Parish.

3. The Return is proclamarifeci secundum formam Statuti: and it is not returned to have been made upon the Land: Hob. 33. Allen & Walter. These were all held erronious; and the Grand Cape was superseded.

Term. Pasch. 26 Car. II. in Communi Banco.

Naylor against Sharply and others Coroners of the County Palatine of Lancaster.

Man brings an Action of Debt against B. Sheriff of the County Palatine of Lancaster, and sues him to an Dutlawy upon mean Poccels, and has a Capias directed to the Chancery of the County Palatine, who makes a Precept to the Coroners of the County, being fix in all, to take his body, and have him before the Kings Juffices of the Court of Common-Pleas at Westminster such a One of the Cozoners being in light of the Defendant, and having a fair opportunity to Arrest him, doth it not: but they all return non est inventus: though he were easie to be found, and might have been taken every day. Dereupon the Plaintiff brings an Action against the Cozoners, and lays his Action in Middlesex; and has a Aerdick for 100 l. Serj. Baldwin moved in Arrest of Judgment: that the Action ought to have been brought in Lancaster: he agreed to the cases put in Bulwer's case 7 Rep. where the cause of Action arises equally in two Counties; but here all that the Cozoners do, subliffs and determines in the County Palatine of Lancaster; for thep make a Return to the Chancery of the County Palatine only, and it is he that makes the Return to the Court. De infifted upon Dyer 38, 39, 40. Husse & Gibbs. 2. De said this action is grounded upon two wrongs, one the not arresting him when he was in light; the other for returning non est inventus, when he might easily have been taken: now for the wrong of one, all are charged, and entire damages given. De faid two Sheriffs make but one Officer, but the case of Cozoners is different: each of them is responsible for himself only, and not for his Companion. Serjeant Turner & Pemberton con-

tra. They faid the Action was well brought in Middlesex, because the Plaintiffs damage arose here, viz. by not having the body here at the day. They cited Bulwer's case, & Dyer 159. b. the Chancery returns to the Court the same answer that the Cozoners return to him, so that their false Return is the cause of prejudice that accrues to the Plaintist here. ground of this Action is the return of non est inventus, which is the act of them all: that one of them faw him, and might have arrested him, and that the Defendant was daily to be found, ac. are but mentioned as arguments to prove the falle Return. And they conceived an Action would not lie against one Cozoner, no moze then against one Sheriff in London, York, Norwich, &c. But to the first exception taken by Baldwin, they faid, admitting the action laid in another County then where it ought, yet after Clerdic it is aided by the Statute of 16 & 17 Car. 2. if the Ven. come from any place of the County where the Action is laid: it is not faid, in any place of the County where the cause of Action ariseth: now this Action is lato in Middlesex, and so the Trial by a Middlesex Jury good, let the cause of Action arise where it will. Cur. That Statute both not help your case; for it is to be intended when the Action is laid in the proper County, where it ought to be laid, which the word proper County implies. But they inclined to give Judgment for the Plaintiff upon the reasons given by Turner & Pemberton. Adjornatur.

Bird & Kirke.

It was resolved in this case by the whole Court; 1. That if there be Tenant for life, the Remainder for life of a Topy-hold, and the Remainder-man for life enter upon the Tenant for life in possession, and make a surrender, that nothing at all passeth hereby; for by his entry he is a Disselsor: and has no customary Estate in him, whereof to make a surrender. 2. That when Tenant for life of a Topy-hold susters a Recovery as Tenant in Fee, that this

is no forfeiture of his Effate; for the Free-hold not being concern't, and it being in a Court-Baron, where there is no Estoppell, and the Lord that is to take advantage of it, if it be a forfeiture, being party to it, it is not to be resembled to the forfeiture of a free-Tenant: that Cufromary Effates have not fuch accidental qualities as Effates at Common Law have, unless by special Lustom. if it were a forfeiture, of this and all other forfeitures committed by Copy-holders, the Lord only, and not any of those in Remainder ought to take advantage. And they gabe Judgment accordingly. North Chief Justice faid, that tohere it is fait in King & Lord's case in Cr. Car. that inhen Tenant for life of a Copy hold furrenders, ec. that no use is left in him, but whosoever is afterward admitted, comes in under the Lord; that that is to be understood of Copy-holds in such Mannogs, where the Custom warrants only Customary Estates for life; and is not applicable to Copp-holds granted for life, with a Remainder in fee.

Anonymus.

A Wilnote of Annuity was brought upon a Prescription against the Rector of the Parish Church of St. Peter, in, etc. the Defendant pleads, that the Church is overflown with the Sea, etc. the Plaintist demurs. Serjeant Nudigate pro Querente: The Declaration is good, for a Wirit of Annuity lies upon a prescription against a Parson, but not against an heir: F. N. B. 152. Rastall 32. the plea of the Church being drowned is not good: at best it is no more then if he had said that part of the Slebe was drowned: it is not the building of the Church, nor the consecrated ground, in respect whereof the Parson is charged; but the profits of the Tythes and the Slebe. Though the Church be down one may be presented to the Rectory: 21 H. 7. 1. 10 H. 7. 13. 16 H. 7. 9. & Luttrel's case, 4 Rep. Wilmote contra. The Parson is charged as Parson of the Church of St. Peter, we plead in effect that there is no such Church,

and he confesseth st. 21 Ed. 4.83. Br. Annuity 39. 21 Ed. 4.20. 11 H. 4.49. we plead that the Church is submersa, obruta, &c. which is as much a dissolution of the Recorp as the death of all the Ponks is a dissolution of an Abbathie. It may be objected that the Defendant has admitted himself Rector by pleading to it: but I answer, 1. An Estoppel is not taken notice of, unless relyed on in pleading. 2. The Plaintist by his demurrer has confessed the Fact of our plea. By which mean the matter is set at large, though we were estopped. The Court was clearly of opinion so, the Plaintist. The Church is the Cure of Souls, and the right of Cythes. If the material Fabrick of the Parish-Church be down, another may be built, and ought to be. Judicium pro Quer', nis, &c.

Dd Term

Term. Trin. 27 Car. II. in Communi Banco.

Vaughton versus Atwood & alios.

Respass so taking away some Flesh-meat from the Plaintist; being a Butcher. The Defendant sussifies by virtue of a Custom of the Pannoz of, acceptate that the Pomage used to chuse every year two Surveyors, to take care that no unwholsome Clicuals were sold within the Precinc of that Pannoz; and that they were swom to execute their Office truly so the space of a year: and that they had power to destroy whatever corrupt Clicuals they found exposed to sale; and that the Desendants, being chosen Surveyors, and swom to execute the Office truly, examining the Plaintists meat (who was also a Butcher) found a side of Beef corrupt and unwholsome, and that therefore they took it away and burnt it, prout eis bene licuit, &c. The Plaintist demurs.

North. This is a case of great consequence, and seems It were hard to disallow the Custom, because the delign of it feems to be for the prefervation of mens health. And to allow it, were to give men too great a power of leize ing and descoying other men's Goods. There is an Aletaffer appointed at Leets, but all his Office is, to make Pzefentment at the Leet, if he finds it not according to the Affize. Wyndham, Atkyns & Ellis: It is a good reasonable Custom. It is to prevent evil, and Laws for prevention are better then Laws for punishment. As for the great power that it seems to allow to these Surveyors, it is at their own peril if they destrop any Clicuals that are not really cogrupt; for in an Action, if they justifie by virtue of the Custom, the Plaintist may take iffue, that the Miduals were not corrupt. But here the Plaintiff has confessed it by the demurrer. Atkyns said, if the Surbeyogs were not responsible, the Homage that put them in must answer for them, according to the rule of respondent superior. Judgment was given for the Plaintiff, unleis, ec.

Thred-

Thredneedle & Lynham's Cafe.

Pon a special Clerdict, the case was thus. The Jury found that the Lands in the Declaration are, and time out of mind had been parcel of the demelnes of the Pannoz of Burniel in the County of Cornwall; which Mannoz confifts of demelnes, viz. Copp hold tenements demilable foz one, two or three lives, and fervices of divers free-hold Tenants: that within the Mannoz of Burniel, there is another Mannoz called Trecaer, confisting likewife of Copy-holds and free-holds: and that the Bishop of Exeter held both these Pannozs in the right of his Bishoppick. Then they find the Statute of I Eliz. in hac verba. They find that the old accustomed yearly Rent, which used to be reserved upon a demise of these two Mannozs, was 67 pounds, 1 s. and 5 d. then they find that Joseph Hall Bishop of Exeter, demised these two Pannozsto one Prowfe for 99 years, determinable upon three lives, referbing the old and accustomed Rent of 67 l. 1 s. and 5 d. that Prowse, Isving the Cestuy que vies, assigned over to James

Prowse the demesnes of the Mannoz of Trecaer, for

, that afterwards he assigned over all his Interest in both Mannozs to Mr. Nosworthy, excepting the demelnes of Treacer, then in the possession of James Prowse: That Mr. Nosworthy, when two of the lives were expired, for a sum of money by him paid to the Bishop of Exeter, surrended into his hands both the faid Mannogs, excepting what was in the polfestion of James Prowse; and that the Bishop (Joseph Hall's Successoz) redemised unto him the said Pannozs, excepting the demelnes of Trecaer, and excepting one Defluage in the occupation of Robert , and excepting one farm par-cel of the Mannoz of Burniel, for three lives, referving 67 l. 1 s. 5 d. with a nomine poenæ: and whether this fecond Leafe was a good Leafe, and the 67 l. 15. 5 d. the old and accustomed Rent, within the intention of the Statute of 1 After several arguments at the Eliz. was the question. Bar, it was argued at the Bench in Michaelmas Term, Ann. 26 Car. 2. And the Court was divided, viz. Vaughan & Ellis against the Lease; Atkyns & Wyndham foz it. This Term North Chief Justice Delivered his Opins on, in which he agreed with Atkyns & Wyndham; so that

the Defendant.

Judgment was given in maintenance of the Leafe; and the Judgment was affirmed in the Kings Bench upon a With of Erroz.

The Chapter of the Collegiate Church of Southwell versus the Bishop of Lincoln, and J. S. Incumbent, &c.

IN a Qua. imp. the Incumbents Title was under a grant made by the Plaintists, who were seized of the Advowson ut de uno grosso, in the right of their Church, of the next abostoance, one Esco being then Incumbent of their Presentation, to Edward King, from whom by mean assignments it came to Elizabeth Bley, who after the death of Esco, presented

Apon a demurrer these points came in question, 1. Whether the grantogs were within the Statute of the 13 Eliz. or not? 2. Whether a grant of a next avoidance be restrained by the Statute? 3. If the grant be void, whe ther it be void ab initio, or when it becomes fo? And 4. Whether the Statute of 13 Eliz. Mall be taken to be a general Law? for it is not pleaded. Serjeant Jones. For the first point argued, that the Grantors are within the Statute; the words are Deans & Chapters, which he said might well be taken severally; for of this Chapter there is no If they were to be taken joyntly, then a Dean were not within this Law, in respect of those possessions, which he holds in the right of his Deanry; but the lubfequent general words do certainly include them; and would extend even to Bishops, but that they are superiour to all that are expressed by name. For the second, be faid the Statute restrains all gifts, grants, &c. other then fuch, upon which the old Rent, &c. De cited Cr. Eliz. 440. 5 Co. the case of Ecclesiastical persons. 10 Co. the Earl of Salisbury's case. For the third point, he held it boid ab initio: it must be to, or good for ever: for here is no Dean, after whose death it may become void: as in

Hunt & Singleton's case: the Chapter in our case never dies. For the fourth point, he argued that it is a general Law, because it concerns all the Clergy: Holland's case, 4 Rep. & Dumpor's case: ibid. 120. b. Willmote contra. North Chief Justice, Atkyns, Wyndham & Ellis Justices, all agreed upon the three first points as Serjeant Jones had arguno. Atkyns doubted whether the 13 of Eliz. were a general Law or not: but was over-ruled. They all agreed, that the Action should have been brought against the Patron, as well as against the Owinary and the Incumbent; but that being only a plea in abatement, that the Defendant has waived the benefit thereof, by pleading in Bar. And Judgment was given for the Plaintiff, Nisi causa, &c. Hunt & Singleton's cafe being mentioned, Atkyns faid: he thought it a hard cafe; considering that the Dean and the Chapter were all persons capable, that a grant should hold in force as long as the Dean lived, and determine then. De thought, they being a Corporation aggregate of persons, who were all capable, that there was no difference betwirt that case and this. fait, that in Floyd & Gregories case, reported in Jones, it was made a point: and that Jones in his argument denied the case of Hunt & Singleton: he said, that himself and Sir Rowland Wainscott reported it, and that nothing was said of that point: but that my Lord Coke followed the Report of Serjeant Bridgeman, who was three or four years their puisne, and that he mistook the case.

Milword & Ingram.

The Plaintist declares in an Action of the case upon a quantum meruit for 40 shillings, and upon an Indebitat. Assumptic for 40 shillings likewise. The Defendant acknowledged the promises; but further says, that the Plaintist and he accounted together for divers sums of money; and that upon the foot of the Account, the Defendant was found to be endebted to the Plaintist in 3 shillings, and that the Plaintist in consideration that the Defendant promised to pay him those 3 shillings, discharged him of all demands. The Plaintist demurred. The Court gave Judgment against

the demurrer: 1. They held, that if two men, being mutually endebted to each other, do account together, and the one is found in arrear so much, and there be an expels agréement to pay the sum found to be in arrear, and each to stand discharged of all other demands: that this is a good discharge in Law, and the parties cannot resort to the original Contracts. But North Ch. Just. said, if there were but one Debt betwirt them, entring into an account for that would not determine the Contract. 2. They held also, that any promise might well be discharged by paroll, but not after it is broken, for then it is a Debt.

Jones & Wait.

Hrewsbury & Cotton are Cowns adjoining; Sir Samuel Jones is Tenant in Tail of Lands in both Towns: Shrewsbury & Cotton are both within the Liberties of the Town of Shrewsbury. Sir Samuel Jones suffers a Common Recovery of all his Lands in both Vills: but the Pracipe was of two Peffuages and Closes thereunto belonging (these were in Shrewsbury) and of, ac. (mentioning those in Cotton) lying and being in the Aille of Shrewsbury, in the Liberties thereof. And whether by this Recovery the Lands lying in Cotton, which is a diffina Clille of it felf, not named in the Recovery, pals of not, was the question. Serjeant Jones argued against the Recovery, he cited Cr. Jac. 575. in Monk & Butler's case, & Cr. Car. 269, 270. & 276. he said the Writ of Covenant, upon which a fine is levied, is a personal Action; but a Common Recovery is a real Action, and the Land it felf demanded in the Pracipe. There is no President, he said, of such a Recovery. De cited a case Hill. 22 & 23 Car. 2. Rot. 223. Hutton 106. & Marche's Reports, one Johnson & Baker's case: which, he faid, was the case in point, and resolved for him. But the Court were all of Opinion that the Lands in Cotton passed. And gave Judgment accordingly. Ellis said, if the Recovery were erroneous, at least, they ought to allow of it, till it were reversed.

Lepping & Kedgewin.

M Action in the nature of a Conspiracy was brought by the Plaintist against the Defendant; in which the Declaration was insufficient. The Defendant pleaded an ill plea: but Judgment was given against the Plaintist upon the insufficiency of the Declaration. Which ought to have been entred, Quod Defendens eat inde fine die: but by mistake, og out of besign, it was entred, Quia placitum prædictum, in forma prædicta superius placitat' materiaque in codem contenta, bonum & sufficiens in lege existit, &c. ideo consideratum est per Cur', quod Quer' nil capiat per bil-The Plaintiff brings a new action, and beclares aright. The Defendant pleads the Judgment in the former Action, and recites the Record verbatim as it was. To which the Plaintist demutred. And Judgment was given for the Plaintist, nisi causa, &c. North Chief Justice; There is no queffion, but that if a man mistakes his Declaration, and the Defendant demurs; the Plaintiff may fet it right in a fecond But here it is objected, that the Judgment is given upon the Defendants plea. Suppose a Declaration be faulty, and the Defendant take no advantage of it, but pleads a plea in bar : and the Maintiff takes iffue, and the right of the matter is found for the Defendant; I hold that in this case the Plaintiff thall never bring his Action about again: for he is estopped by the Aerdia. De suppose such a Plaintiff demur to the plea in bar; there by his demurrer he confelleth the fact, if well pleaded; and this eldops him as much as a Aerdia would. But if the plea were not good, then there is no Ecoppel. And we must take notice of the Before dants plea; for upon the matter, as that falls out to be good, or otherwife, the fecond Action will be maintainable, or not. The other Judges agreed with him in omnibus.

ifii.

Atkinson & Rawson.

De Plaintiff declares against the Defendant as Erecu-The Defendant pleads that the Testatoz made his Will, and that he the Defendant, suscepto super se onere Testamenti prædict. &c. did pay divers sums of money due upon specialties, and that there was a Debt owing by the Teflatoz to the Defendants Wife; and that he retained fo much of the Testators Goods, as to satisfie that Debt, and that he had no other Aslets: The Plaintist demurred, because for ought appears the Defendant is an Executor de son tort: and then he cannot retain, for his own debt. The Plaintiffs naming him in his Declaration, Executor of the Testament of, &c. will not make for him: for that he does of necessity; he cannot declare against him any other way, and of that Opinion was all the Court, viz. that he ought to entitle himfelf to the Executorihip, that it may appear to the Court, that be is such a person as may retain. And accordingly Judgment was given for the Plaintiff.

Term. Hill. 27 & 28 Car. II. in Com. Banco.

Smith's Cafe.

Daughters. One of the Sons dies intestate: the elver of the two surviving Brothers takes out Administration, and Sir Lionel Jenkins Judge of the Prerogative Court, would compell the Administrator to make distribution to the Sisters of the half-blood. He prayed a Prohibition, but it was denied upon advice by all the Judges: for that the Sisters of the half-blood, being a kin to the Intestate, and not in remotiori gradu then the Brother of the whole blood, must be accounted in equal degree.

Anonymus.

And adion was brought against four men, viz. two Attoznies and Wolicitors, for being Attornies and Solicitors in a cause against the Plaintist in an inferiour Court, falso malitiose, knowing that there was no cause of Action against him: and also for that they sued the Plaintist in another Court, knowing that he was an Attorney of the Common-Pleas, and priviledged there. Per tot 'Cur', there is no cause of Action. For put the case as strong as you will: suppose a man be retained as an Attorney to sue for a debt, which he knows to be released, and that himself were a witness to the Release; pet the Court held that the Action would not sye, for that what he does, is only as Servant to another, and in the way of his Calling and Profession. And for suing an Attorney in an inferiour Court; that (they said) was no

Term. Hill. 27 & 28 Car. II. in C. B.

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cause of Action: for who knows whether he will insist upon his priviledge or not? and if he does, he may plead it, and have it allowed.

Fits & al. versus Freestone.

IN an Action grounded upon a promife in Law, payment before the Action brought is allowed to be given in Evidence upon non Assumptit. But where the Action is grounded upon a special promise, there payment or any other legal discharge, must be pleaded.

Bringloe versus Morrice.

In Trespass for immoderately riving the Plaintiffs Ware. the Defendant pleaded, that the Plaintiff lent to him the said Mare. & licentiam dedit eidem aquitare upon the faid Ware, and that by virtue of this Licence the Defendant and his Servant alternation had tid upon the Ware. Plaintiff demurs. Serj Skipwith pro Quer'. The Licence is personal and incommunicable: as, 12 H. 7. 25. 13 H. 7. 13. the Dutchess of Norfolk's case. 18 Ed. 4. 14. Serj. Nudigate contra. This Licence is given by the party, and not created by Law, wherefore no Trespals lyeth: 8 Rep. 146, 147. per Cur', the Licence is annexed to the person, and cannot be communicated to another: for this riding is matter of pleafure. North took a difference where a certain time is limited for the Loan of the Porle, and where not. In the first case, the party to whom the Pogle is lent, hath an interest in the Porfe during that time, and in that case his Servant may rive: but in the other case not. A difference was taken betwirt hiring a Posle to go to York, and bosrowing a Posle: in the first place the party may let his Servant up; in the lecond not.

Term.

Term. Pasch. 28 Car. II. in Communi Banco

Anonymus.

Man upon marriage Covenants with his Wives relations, to let her make a Will of fuch and fuch Goods: the made a Will accordingly by her bufbands confent, and dyed. After her death, her Mill being brought to the Prerogative Court to be proved, a Prohibition was prayed by the husband, upon this suggestion, that the Testatrix was forming viro cooperta, and so disabled by the Law to make a Mill. Cur'. Let a Prohibition go. Nisi causa, &c. North. When a question artieth concerning the Jurisdiction of the Spiritual Court, as whether they ought to have the Probate of such a Will, whether such a disposition of a personal Estate be a Will of not, whether such a Will ought to be proved before a peculiar, or before the Droinary, whether by the Archbishop of one Province or another, or both, and what thall be bona notabilia; in these and the like cases. the Common Law retains the Jurisdiction of Determining; there is no question, but that here is a good surmise for a 1020. hibition; to wit, that the woman was a person disabled by the Law to make a Will; the Dusband may by Covenant depart with his right, and luffer his Wife to make a Will; but whether he hath done to here or not thall be determined by the Law: we will not leave it to their decision: it is too great an invalion upon the right of the Husband. In this case the Spiritual Court has no Jurisdiction at all: they have the Probate of Mils, but a Feme-covert cannot make a Mil. If the disposeth of any thing by her busbands consent, the property of what the fo disposeth, passeth from him to her Legatee, and it is the gift of the husband. If the Goods were given into anothers hands in trust for the wife; still her telill is but a Declaration of the truft, and not a Will, properly fo called. But of things in Action, and things that a Feme-Covert hath as Executric, the map make a Will by her Duf-EE 2

bands confent: and fuch a Will, being properly a Will in Law, ought to be proved in the Spiritual Court. In the case in question a Probibition was granted.

--- against the Hambrough Company.

De Plaintiff brought an Action of Debt in London against the Hambrough-Company, who not appearing upon Summons, and a Nihit being returned againft them, an Actachment was granted, to attach Debts owing to the Company, in the bands of 14 feveral perlons : by Certiorari the cause was removed into this Court; and whether a Pro-

cedendo hould be granted or not, was the question.

Berjeant Goodfellow, Baldwin, and Barrell argued, that a debt owing to a Composation is not attachable. Maynard & Scroggs contra. Cur'. We are not Judges of the Customs of London; not do we take upon us to determine whether a debt owing to a Copposation, be within the Eustom of forcein Attachment, or not. This we judge and agree in. that it is not unreasonable that a Copposation's debts sould be attached. If we had judged the Custom unreasonable, we could and would have retained the cause: For we can over-tule a Custom, though it be one of the Customs of London, that are confirmed by Act of Parliament, if it be against natural reason. But because in this Custom we find no fuch thing, we will return the cause. Let them proceed according to the Custom, at their peril. If there be no such Custom, they that are aggrieved may take their remedy at We do not dread the consequences of it. It does but tend to the advancement of Justice; and accordingly a Procedendo was granted per North Chief Justice, Wyndham & Ellis. Atkyns aberat.

Anonymus.

Per Cur', if a man is indicted upon the Statute of Recufancy, Conformity is a good plea: but not, if an Action of Debt be brought.

Parten & Baseden's Case.

Arten brought an Action of Debt in this Court against the Testator of Baseden the now Defenvant, a o had Judgment. After whose death there was a devastavit returned againft the Defendant Baseden, bis Erecutor: he appeared to it, and pleaded, and a special Aerdia was found, to this effect, viz. that the Defendant Baseden was made Erecutor by the Will, and dwelt in the same house, in which the Testator lived and died, and that before Probate of the Will he polfest himself of the Goods of the Testatoz, prized them, inventogied them, and fold part of them, and pato a Debt, and converted the value of the relidue to his own ule; that afterwards before the Ordinary he refused, and that upon his refusal administration was committed to the Widow of the deceased. And the question was, whether or no the Defendant should be charged to the value of the whole perfonal Estate, or only for as much as he converted.

Serjeant Barrell argued, That he ought to be charged for the whole, because; 1. De is made Executor by the Usill's and he is thereby compleat Executor before Probate, to all intents but bringing of Actions. 2. He has possession of the Goods, and is chargeable in respect of that. 3. He caused some to be sold, and paid a Debt: which is a sufficient administration. There is found to discharge him, 1. Dis resulal before the Ordinary But that being after he had so far intermeddled, avails nothing: Hensloe's case: 9 Co. 37. An Executor de son tort, he consessed, should not be charged for more then he converted; and shall discharge himself by delivering over the rest to the rightful Executor. But the case is dissessing

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rent of a rightful Executor, that has taken upon him the burben of the Alill. The second thing found to discharge him, is the granting of Administration to another: but that is void, because here is a rightful Executor that has administration. Hob. 46. Keble & Osbaston's case. The third thing found to discharge him, is the delivery of the Goods over to the Administrator: but that will not avail him; for himself became responsible by his having possession, and he cannot discharge himself by delivering the Goods over to a stranger, that has nothing to do with them. If it be objected, that by this means two persons will be chargeable in respect of the same Goods; I answer, that payment by either discharges both: Cr. Car. Whitmore & Porter's case.

The Court was of Opinion, that the committing of Administration in this case, is a mere void act. A great inconvenience would ensue, if men were allowed to Administer as far as they would themselves, and then to set up a beggarly Administratoz: they would pay themselves their own Debts, and deliver the residue of the Citate to one that's worth nothing, and cheat the rest of the Creditors. If an Administratoz dring an Action, it is a good plea to say, that the Crecutoz made by the Will has administred. Accordingly Judgment was given for the Plaintiss.

Major & Stubbing versus Birde & Harrison.

Resolved, that a plea may be a good plea in abatement, though it contain matter that goes in bat; they relyed upon the case in 10 H. 7. fol. 11. which they said was a case in point, and Salkell & Skelton's case, 2 Rolls Reports: and Judgment was given accordingly.

Term.

Term. Trin. 28 Car. II. in Communi Banco.

Er North Chief Justice; if there are Accounts between two Perchants, and one of them becomes Bankrupt, the course is not to make the other, who perhaps upon stating the Accounts, is found endebted to the Bankrupt, to pay the whole that originally was entrusted to him, and to put him soft the recovery of what the Bankrupt owes him, into the same condition with the rest of the Creditors; but to make him pay that only which appears due to Bankrupt on the foot of the Account: otherwise it will be soft Accounts betwirt them after the time of the others becoming Bankrupt, if any such were.

Wing & Jackson,

Respals Quare vi & armis, the Defendant insultum secit upon the Plaintist was brought in the County Court; and Judgment there given for the Plaintist. But it was reversed here upon a Writ of falle Judgment, because the County Court, not being a Court of Record, cannot sine the Defendant, as he ought to be, if the cause go against him, because of the vi & armis in the Declaration: but an Action of Trespals without those words will lie in the County Court well enough.

Anonymus.

A clicar libell'd in the Spiritual Court for Tythes of of young Cattle, and furmiled that the Defendant was feiled of Lands in Middlesex, of which Parish he was clicar, and that the Defendant had Common in a great classe called Sedgemore-Common, as belonging to his Land in Middlesex; and put his Cattle into the said Common. The Defendant prayed a Prohibition, for that the Land where the Cattle went was not within the Parish of Middlesex. The same Plaintist libelled against the same Defendant for Cythes of chillow-faggots; who suggests to have a Prohibition, the payment of 2 d. a year to the Rector, so all Cythes of Chillow. The same Plaintist libelled also for Cythes of Chillow. The same Plaintist libelled also for Cythes of Sheep. The Defendant, to have a Prohibition, suggests, that he took them in, to seed, after the Corn was reaped, pro melioratione agriculture infra terras arabiles & non aliter.

As for the first of these no Prohibition was granted, because of that clause in 2 Edw. 6. whereby it is enaced, that Cythes of Cattle feeding in a Masse or Common, where the Parish is not certainly known, shall be past to the Parson, ec. of the

Parish where the owner of the Cattle lives.

For the second, they held that a modus to the Rector is a good discharge against the Aicar. For the third, they held that the Parson ought not to have Tythe of the Corn and Sheep too, which make the ground more profitable, and to yield more. Per quod, &c.

Ingram versus Tothill & Ren.

Replevin. Trevill leased to Ingram for 99 years, if Joan Ingram his wife, Anthony & John Ingram his Sons should so long live, rendring an Periot of 40 shillings to the Lessor and his Assigns, at the election of the Lessor his heirs and Assigns, after their several deaths successive, as they are named in the Indenture. Trevill deviseth the Reversion. John dyes, and then Joan dies: and the question was, whether

ther or no a periot were due to the Devilee upon the death of Joan. The Court agreed that the abowy was faulty, because it does not appear thereby, whether Anthony Ingram was alive or not at the time of the diffress taken; for if he were dead, the Lease would be determined. North. Though Anthony were alive, the Devicee of Trevill could not distrain for the Periot, for that the refervation is to him and his Affigns, and although the Election to have the Periot or 40 thillings given to the Lessoz, his heirs of Assigns, pet that will not help the fault in the refervation. Ellis. There is another fault, in the pleading; for it is pleaded that Trevill made his Will in writing; but it is not faid, that he dyed to feized; for if the Effate of the Deviloz were turned to a right at the time of his death, the Will could not operate upon it. Also it is said, that the Avolvant made his Election, and that the Plaintiff habuit notiriam of his Election, but it is not faid by whom notice was given: for these causes Judgment was given for the Plaintiff. It was urged likewife against the Avowant, that no Deriot could be due in this case, because Joan did not die first: but the course of fuccession is interrupted; and that a Periot not being due of common right, the words of refervation ought to be purfued: but as to this the Court delivered no Opinion.

Ognell versus the Lord Arlington Guardian of Sir John Jacob.

Jury, that if there be Tenant by Elegit of certain Lands, and a fine be levied of those Lands, and five years with non-claim pass, that the interest of the Tenant by Elegit is bound, according to Sastyn's case 5 Rep. otherwise, if the Land had not been actually extended. Also, that if an Inquisition upon an Elegit be found, the party before entry has the possession, and a fine with non-claim shall bat his right; for before actual entry he may have Ejectione sirms or Trespals, and so not like to an interest termini.

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Barry & Trebeswycke.

If a Parson have a Pension by Pzescription, he may either bying an Action at the Common Law, or commence a Suit in the Spiritual Court; but if he byings a Writ of Annuity at the Common Law, he can never after sue in the Spiritual Court, for that his Election is determined.

Wakeman & Blackwell.

IN a Quare impedit the Defendant pleaded a recovery in this manner, viz. that John Wakeman Standfather to the Plaintiff was seized in see of the Pannot, to which, ec. and that a Præcipe was brought against one Prinne & Philpotts, adtunc tenentes liberi tenementi, &c. who appeared and bouched John Wakeman, &c. and that this Recovery was to

the use of J. S. under whom the Defendant claims.

Strode, pro Defendente: it is not necessary that the Tenant in a Common Recovery have a freehold, at the time of the purchase of the Wirit: if he have at the time of the return, it sufficeth. 7 Ed. 3.42. 7 Ed. 3.70. As of no. dis. 43 Ed. 3.21. in these Authorities the person against whom the Pracipe is brought, comes in by right, after the purchase, and before the return of the Wirit. But in 26 Ed. 3.68. there is an example, where the Tenant to the Pracipe comes in by tort; but there is this difference: if he comes to the Land by his own act, be it by right or by wrong, there he makes the Wirit good: otherwise if he come to it by act of Law. 8 Ed. 3.22. a. Formedon. 25 H.6. 4. the reason why you shall not abate the Plaintiss Wirit by your own act, is because you cannot give him a better.

The demandant here is escoped to say, that there was not a Tenant to the Præcipe in this Recovery; so, the Writ is but abatable, if brought against one that is not Tenant: and as long as it stands not abated, but is pleaded to, &c. it shall conclude all that are parties and privies, and all claiming under them: 34 Ed. 3. F. tit. droit 39. here is in our case an

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effoppell, with a recompence: Wakeman the Grandfather, who was the first Vouchee in this Recovery, might have counterpleaded the lien and extorted the warranty; but having bouched over, he is past that advantage, and is concluded, being

made a party by Voucher.

This being a common Recovery, the Court will do all they can to make it good. A fine is levied by Dedimus potestatem by Baron and feme. The Commissioners did not return the examination of the wife; and pet that is the discriminating difference, upon which depends whether the wife thall be bound by the fine of not: 15 Ed. 4. 28. a. Litt. Sect. 670. 6 Ed. 3. 22. a. The Court must needs in this case intend, that Prinne & Philpots came in by conveyance, because Wakeman came in upon the Voucher, which he would not have done, if there had not been a lien. De cited Cro. Jac. 454. Lincoln Colledge case, 3 Rep. 48. & Hob. 262. Duncomb & Wingfield's case. To which Pemberton answered, that tunc tenens is a sufficient averment in the pleading of a Recovery, which is favoured in Law; but it is not good alone, when in the same sentence a matter is let forth, that is inconsistent with it, and plainly contradictory, as in this case; and of that opinion was the The case in Hob. they said was upon a special Clerdict: where many things may be intended, which shall not be to in pleading: and in Lincoln Col' case the writ is said to be brought against one Edw. Chamberlain in one part of the Record, and the Wother is faid to be Tenant in another part of the Record, and by the other party; but here in the same sentence uno flatu, there is a flat contradiction.

Burrow & Haggett.

Ormedon in the descender. The Defendant pleaded in abatement of the Count, and took these exceptions : 1. That the demandant declares that the right descended to him after the death of Leonard, as Brother and heir to Leon: and Son and Peir of the Donee; but does not alledge that Leonard died without issue: 8 Rep. 88. Buckmere's case. In ancient Registers the clause is eo quod, the issue dyed without iffue: Co. Ent. 254. b. &c. Raft. Entr. 365. C. Yelv. 227.

Glasse & Gyll's case. 9 Ed. 4. 36. a man that entitles himself as heir, must shew how he is heir. Seyle contra. The presifidents are on our fide: and the difference is betwirt a Formedon in the descender, and a Formedon in the remainder of re-In the former they do not mention the dying without issue of him, after whose death they claim: for the Count there is in effect only to fet out their pedigree; but in a Formedon in the Remainder of Reverter, it is otherwise: 39 Ed. 3.27. Old Book of Ent' 339. tit. Formed', bar: plac' 3. Co. Lit. Mandevile's case, 26 b 7 H. 7. fol. 7. b there our case is put in express terms; the exception taken to the Count there by Keble, is the same that is taken to ours here: and there it is over-ruled. North I have looked into presidents, and find the Count in this case according to them. It is a plain and reasonable difference betwirt a Formedon in the discender, and a Formedon in the remainder or reverter: noz could the demandant be brother and heir to Leonard, if Leonard had left children, ec. Another exception was, that the demandant does not let forth, that he was Son and heir of John, begotten on the body of Jane his wife; for it was a gift in special tail. But this was over-ruled; for in the Writ that is let forth, and in the Declaration, after the words filio & hæredi prædict. Johannis, came an (&c.) which (&c.) let the words of the Wirit into the Count; and so it was held good. The Prothonotaries faid, that the forms of Counts were accordingly. And Judgment was given to answer over, Nisi causa, &c.

Term. Mich. 28 Car. II. in Communi Banco.

Blythe versus Hill.

at a day certain. The Defendant pleaded that the Plaintiff, being desirous to have the money paid befoze the day, took another Bond for the same sum payable sooner: and that this was in sull satisfaction of the former Bond; upon this plea the Plaintiff took issue, and it was found against him. And Serjeant Maynard moved, that notwithstanding this Aerdick, Judgment ought to be given for the Plaintiff; for that the Defendant by his plea has confessed the Action; and to say that another Bond was given in satisfaction, is nothing to the purpose: Hob.68. so that upon the whole it appears that the Plaintiff has the right, and he ought to have Judgment: 2 Cr. 139. 8 Co. 93. a. and day was given to shew cause why the Plaintiff should not have Judgment: Vide infra hoc eodem Termino.

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Savill against the Hundred of -----

De Plaintist in an Action upon the Stat. of Wint. had a Aeroic, and it was moved in arrest of Judgment, that the Felonious taking is not said to be in the High-way: 2 Cro. 469, 675. North. An Action lies upon the Stat. of Winton, though the Robbery be not committed in the High-way: to which the Court agreed: and the Prothonotaries said, that the Entries were frequently so. Per quod, &c.

Calthrop

Calthrop & Philippo.

Me J. S. had recovered a Debt against Calthrop, and procured a Writ of Execution to Philippo the then Sheriff of D. but before that Wirit was executed, Calthrop procured a Supersedeas to the same Philippo, who when his pear was out, delivered over all the Writs to the new Sherist, save this Supersedeas, which not being delivered, J. S. procures a new Writ of Execution to the new Sheriff; upon which the Goods of Calthrop being taken, he brings his action against Philippo, for not belivering over the Supersedeas. After a Aerdict for the Plaintiff, it was moved in arrest of Judgment, that the Action would not lie, for that the Sheriff is not bound to deliver over a Supersedeas. 1. Because it is not a Writ that has a return. 2. Because it is only the Sheriffs Warrant foz not obeying the Writ of Execution. The Prothonotaries faid, that the course was to take out a new Wirit to the new Sheriff. Serjeant Strode argued, that the Supersedeas ought to be velivered over: because the Kings Wirit to the old Sheriff is, Quod Com' prædict' cum pertinentiis, uno cum rotulis, brevibus, memorandis & omnibus officium illud tangentibus, quæ in custodia sua existunt, liberet, &c. Reg. 295. & 3 Co. 72. Westby's case. Besides, the Supersedeas is for the Defendants benefit; and there is no reafon why the Capias should be delivered over, which is for the Plaintiffs benefit, and not the Supersedeas, which is for the Defendants. And he faid an Action will lie for not delllivering over some Writs to the new Sheriff, though those Writs are not returnable: as a Writ of Estrepement. The Court inclined to his Opinion: but it was adjourned to a further day, on which day it was not moved.

Bascawin & Herle versus Cooke.

Ho. Cook granted a Rent-charge of 200 l. per annum to Bascawin & Herle for the life of Mary Cook, habend' to them, their heirs and affigns, ad opus & usum of Mary, and in the Indenture covenanted to pay the rent ad opus & usum of Mary. Bascawin & Herle upon this bring an Action of Cobenant, and affign the breach in not paying the Rent to themfelbes, ad opus & usum of Mary. The Defendant demurs: 1. Because the words in which the breach is assign'd, contain a negative pregnant. Baldwin for the Plaintiff; we affign the breach in the words of the Covenant. Cur' accord. 2. Because the Plaintist does not say that the money was not paid to Mary, it would fatisfie the Covenant. 3. This Rentcharge is executed to Mary by the Stat. of Uses, and the ought to have diffrained for it: for the having a remedy, the Plaintiffs, out of whom the Rent is transferred by the Statute, cannot bying this Action : Dereupon two queffions were made, 1. Whether this remedy by Action of Covenant be transfer. red to Mary by the Stat. of Ules of not? and adly, if not, whether the Covenant were discharged or not? North & Wyndham : When the Statute transfers an Effate, it transfers together with it such remedies only, as by Law are inci-bent to that Estate, and not collateral ones. Atkyns accordant. There is a clause in the Statute of 27 H. 8. c. 10. which gives the Cestuy que use of a Rent all such remedies, as he would have had, if the Rent had been actually and really granted to him: but that has place only where one is feized of Lands in truff that another thall have a Rent out of them: not where a Rent is granted to one to the use of another. They agreed also that the Covenant was not discharned. And nave Judgment for the Plaintiff, Nili, &c.

Higden versus VV hitechurch, Executor of Dethicke.

Udita Querela. The Plaintiff Declares, that himfelf and one Prettyman became bound to the Teffatoz foz the payment of a certain sum: that in an Action brought against him he was Dutlawed: that Dethick afterward brought another Action upon the same Bond against Prettyman, and had Judgment: that Prettyman was taken by a Cap. ad fatisfaciend', and impgisoned, and paid the Debt, and was released by Dethick's confent : upon this matter the Plaintiff here prays to be relieved against this Judgment and Dutlawry. The Defendant protestando that the Debt was not satisfied, pleads the Dutlaway in disability. The Plaintiff demurs. Baldw. for the Diaintiff. Non datur exceptio ejus rei, cujus petitur diffolutio. De resembled this to the cases of bringing a Writ of Erroz og Artaint, in neither of which Duclawy is pleadable. 3 Cr. 225. 7 H. 4. 39. 7 H. 6. 44. Seyse contra. Dutlamy is a good plea in Audita querela. 2 Cr. 425 8 Co. 141. this cafe is not within the maxime that has been cited; a wit of Erroz and Attaint is within it: foz in both them the Judgment it self is to be reversed. But in an Audita querela you admit the Judgment to be good: only upon some equitable matter arising since, you pray that no Execution may be upon it: Vide 6 Ed. 4. 9. b. & Jason & Kite's case: Mich. 12 Car. 2. Rot. 385. Adj. Pasch. 13. Cur' accord'. If the Judgment had been erroneous, and a wit of Erroz had been brought, the Dutlawry, which was but a superstructure, would fall by consequence; but an Audita querela meddles not with the Judgment: the Plaintiff here has no remedy, but to fue out his Charter of Par-Don.

Blythe & Hill, Supra 221.

he case being moved again, appeared to be thus, viz. The Plaintiff brought an Action of Debt upon a Bond against the Defendant as heir to the Obligoz. The Defen-Dant pleaded, that the Obligoz, his Ancestoz, dyed intestate, and that one J.S. had taken out Letters of Administration, and had given the Plaintiff another Bond in full latisfaction of the former. Upon this, iffue being joyned, it was found for the It was faid for him, that one Bond might be taken in fatisfaction of another; and 1 Inst. 212. b. 30 Ed. 1. 23. Dyer 29. were cited. North Chief Justice: If the lecond Bond had been given by the Obligoz himfelf, it would not have discharged the former: but here, being given by the Administratoz, so that the Plaintiss security is bettered, and the Administratoz chargeable de bonis propriis, I concesue it may be a sufficient discharge of the first Bond. Wyndham accord', else the Administrator and Peir might both be charged. Scroggs accord. Atkyns. There are many Authorities in the point; and all directly, that one Bond cannot be given in satisfaction of another. So is Cr. Eliz. 623, 697, 716. 727. and many others. But yet I hold that Judgment ought to be given for the Defendant; for though it be an impertinent issue, yet being found for him, he ought by the Statute of 23 H. 8. to have Judgment. If no issue at all had been joyned, it would have been otherwise: 2 Cro. 44. 575. Serjeant Maynard cites 9 H. 6. but that cafe was before the Statute: so I ground my Judgment upon that point. North. I took it, that unapt issues are aided by the Statute, but not immaterial ones. And fo faid Scroggs. Judic' pro Defendente, Nisi, &c.

Southcot & Stowell.

Intrat' Hill. 25 & 26 Car. 2. Rot. 1303.

Novenant for non-payment of money. The cafe was thus; viz. Thomas Southcote had thue two Sons; Sir Popham and William; and in confideration of the marriage of his Son Sir Popham, covenanted to fland feized to the ufe of Sir Popham and the heirs Males of his body; and for befault of luch issue, to the use of the heirs Males of his own body, the remainder to his own right heirs. Sir Popham dies, leaving iffue Edward bis Son, and four Daughters : then Thomas the father Died; and then Edward Died without iffue, and the question was, whether Sir Pophams Daughters of William had the better title? Two points were made, 1. Whether the limitation of the Remainder to the peirs Bales of the body of the Covenantoz, were good in its creation, oz not? 2. Admitting it to be good originally, whether it could take effect after the beath of Edward; he leaving Sifters, which are general beirs to the Covenantoz. North, Wyndham & Atkyns, upon admission of the first point, were of optnion for William: and that he Mould have the Effate, not by purchase, but by descent from Edward : for after the beath of the father, both the Effates in tail were veffed in him: and he was capable of the remainder by purchale: and being once well beffed in a purchafer, the Effate thall afterwards run in course of vescent: Scroggs boubted. But they all boubted of the firft point, and would advife. V. infr' Pafch. 29 Car. 2.

It was fato by the Inflices in the Countes of Northumberlands case, That if a knight be but returned on a Jury, when a Mobleman is concerned, it is not material whether he appear and give his Aerdict of no. Also, that if there be no other knights in the County, a Serieant at Law that is a knight, may be returned, and his priviledge shall not excuse

him.

Gayle & Betts.

Ebt upon a Bond. The Defendant demands Over of the Bond and Condition; which was to pay forty pounds per annum quarterly fo long as the Defendant should continue Register to the Arch deacon of Colchester; and says that the Office was granted to A. B. & C. fortheir lives: and that he enjoyed the Office to long as they lived and no longer, and that so long he paid the said 40 l. quarterly. The Plaintiff replies, that the Defendant did enjoy the Office longer, and had not paid the money. The Defendant demurs, supposing the replication was double. Cur'. The Replication is not double: for the Defendant cannot take iffue upon the non-payment of the money; that would be a departure from his plea in bar : To if upon a plea of nullum fecit arbitrium, the Plaintiff in his Replication let forth an award and a breach, the Defendant cannot take iffue upon the breach, for that would be an implicite confession of what he had denied befoze. If the Defendant plead that he did not exercise the Office brpond fuch a time, till which time he paid the money, the Plaintiff may take iffue either upon the payment till that time, or reply upon the continuance; but if he do the latter, he must thew a breach; for the continuance is in it felf no breach.

Ellis & Yarborough.

A Ction upon the Cale against a Sherist for an Escape. The Plaintist declares, that one G. was endebted to him in 2001. and that the Defendant took him upon a Latitat at the Plaintists suit: and afterward susceed him to escape. The Defendant pleads the Statute of 23 H. 6. cap. 10. and that he let G out upon Bail, according to the said Statute, and that he had taken reasonable Sureties, A. & B. persons having sufficient within the County. The Plaintist replies and traverses, absque hoc, that the Defendant took Bail of persons having sufficient within the County: the Defendant demurs. Skipwith. The Sherist is compellable to take Bail.

Gg 2

If he take insufficient Bail, the course is for the Court to amerce the Sherist, and not for the party to have an Action upon the case: Cr. Eliz. 852. Bowles and Lassell's case, and Noy 39. if the Sherist takes no Bail, an Action lies against him: and all Actions brought upon this Statute are founded upon this suggestion: 3 Cro. 460. Moor. 428. 2 Cro. 280. but if he take insufficient bail, it is at his own peril; and no Action lies: the Sherist is Judge of the bail, and the sum is at his discretion: Cr. Jac. 286. Villers & Hastings: and so are the number of the persons, he may take one, two or three, as he pleaseth. De cited Cr. Eliz. 808. Cliston & Web's case. Besides the traverse is pregnant, for it implies that the persons have sufficient out of the County; and the Sherist is not bound to take bail only of persons having sufficient within the County.

Serjeant Barrell contra.

The Court not agreeing in their Opinions upon the matter of Law, it was put off to the next Term, to be argued.

Baldwin for the Defendant, cited 3 Cr. 624. 152. 2 Cr. 286. Noy 39. Rolls, tit. Escape, 807. Moor 428. that the Sheriff is compellable to let him to bail, and is Judge of the sufficiency of the Sureties. The Statute was made for the Prisoners benefit, for the mischief before was, that the Sheriff not being compellable to bail him, would ertort money from him to be bailed: and the word sufficient is added in favour of the Sheriff; and so are the words, within the County. The Sheriff is not compellable to assign the bail Bond; and then, if the Plaintist cannot have the security given by the Defendant for his appearance, it is all one to him, whether it be good or no.

Strode contra. Why must the Sherist always aver that he has taken sufficient Sureties, if their sufficiency be not material? Why is an Action allowed to lie, if the Sherist take no Sureties at all, since according to my Brothers Dpinion, the party has no interest in them? If the Law be as they argue, the Statute has left the Plaintist in a worse condition then he was at the Common Law: for it has deprived him of the remedy that he had before; and the Amercements belong not to him, but to the King.

Cur'. The lufficiency of the bail is not material: it is only for the Sheriffs own lecurity. If he take no bail at all, an Action lies against him, for then he does not act by colour of this Law. Arkyns. The Statute is not advantagious to the Plain-

Plaintist at all, unless the Sherist let go the pzisoner without taking any bail; and then he must render treble damages. And by the Opinion of the whole Court Judgment was given for the Defendant.

Moor versus Field.

Tustom was alledged, that all persons in a Parish that had Shiep upon their ground on Candlemas-day, should be discharged of Tythes of all Sheep that should be upon their ground after in that year, upon payment of full Tythes so all the Sheep that were there upon that day; and this was adjudged an unreasonable Tustom. Serjeant Turner argued so it, and cited Rolls Abr' 2 part, 647,648.

Term.

Term. Hill. 28 6 29 Car. II. Communi Banco.

Strode versus l'Evesq; de Bath & Wells, and Sir George Horner and Masters.

Uare Impedit, the Plaintist entitles himself by vertue of a Grant of the next Avoivance made by Six George Horner, and counts that Six George was seized in see of the Pannor of Dowling; to which the advowlon was appendant, and presented J. S. who was admitted, instituted, ec. and that then he granted the next Avoivance to the Plaintist, and that J. S. vied and it belongs to him to present.

Serjeant Barton. The Plaintiss has failed in his Count, he says, That Six George was seized, and presented, but he does not say, That he presented tempore pacis, F. N. B. 33. Hob. 102. 6 Co. 30. 1 Inst. 249. F. N. B. 31. 5 Co. 72.

Vaug. 53.

Strode. Alhen the Plaintist makes his Title by a Prefentation, he ought to say, That it was tempore pacis; but Six Georges Title is by reason of his being seized of the Mannor of Dowling, to which the Advowson is appendant. So that the dissernce, as to that, will be betwirt an Advowson in gross and an Advowson appendant.

Cur. When a man thews a precedent Right, and then alledges a Presentation, in pursuance of that Right, as in this case the Plaintist does in Six George Horner, there it needs not be alledged to have been tempore pacis; but where no Title is alledged, so that the Presentation only makes the Title, there it must be pleaded tempore pacis.

Davies & Cutt.

Avies as Administrator to Eliz. B. a seme Covert, brings an Action of Webt upon a Bond against Cutt. The Defendant pleads, That Administration of the Wises goods ought de jure to be committed to the Husband, who was then alive: upon this there was a Demurrer, and it was resolved for the Plaintist, for he is rightful Administrator till his Letters of Administration are repealed.

James & Johnson.

Respass. For taking and diving away some Beats of the Plaintist, the Defendant sustices, for that he and all they whose Estate he has in such a Dannor (the Dannor of Blythe) have had a Toll for all Beats driven over the said Dannor, viz. I d. a Beats, is under twenty; and is above, then 4 d. a score. Issue being somed upon this sustification, a special Aerdic was found, viz. That the Dannor asocesaid was parcel of the Possessions of the Priory of Blythe, that the Prior had by Prescription such a Toll, as appurtenant to the said Dannor: that by the dissolution it came to the Crown, and so to Six Gervase Cliston, and at last to one Bingley; in whose Right, as Servant to him the Defendant justifies, but then they conclude, that if the Defendant may entitle himself to it by a que estate, they find so the Defendant; if not, then so the Plaintist.

Serjeant Baldw. For the Plaintiff it does not appear, imbether the Coll which the Defendant claims, he a Toll-thorough, or a Toll-traverse, or what fort of Coll it is. A Toll-thorough is against common Right, because it is to be taken in the kings high-way. And no Prescription can be for it, unless he that claims it, them that the Subject has some advantage by it. And when a man claims a Toll-traverse, he must say it to be for a way over his own Freehold, Keil. 148. Statham, Toll 2. Pl. 236. Moor 574. Cr. Eliz. 710. Keil. 152. A Coll supposeth a Grant from the

Trown,

Crown, and therefore when the Mannoz of Blythe came to the Crown, the Coll was disjoyned from the Mannoz, and became in gross. Moz can a Coll be appendant to a Man-

noz, noz claimed by a que estate.

Serjeant Maynard. The Jury have found exactly whatever the Defendant has disclosed in his Plea, and have made a special conclusion upon a Point of pleading. Toll may be appurtenant to a Mannoz, as well as any other profit a pren-May does it become in gross by the Mannoz coming The difference is, as to that, betwirt things, that had a being in the Crown, befoze they were granted out to Subjects, and things which had not, 9. Rep. The Case of the Abbot of Strata Marcella. There is no such legal difference between a Toll-thorough and a Toll-traverse, as has been offered: the words are used promiscuously in our A Toll-thorough may be by Prescription, without any reasonable cause alledged of its commencement: for having been paid time out of mind, the true cause of its beginning, in the intendment of the Law cannot be known. And for the que estate; indeed a thing that lies in grant, cannot be claimed by a que estate directly by it self, but it may be claimed as appurtenant to a Pannoz, by a que estate in the Mannoy, ec. Cur. accord. and gave Judgment Atkyns. When Toll is claimed genefor the Defendant. tally, it shall be intended Toll-thorough, and so is the case in Cr. Eliz. 710. Smith & Shepheard.

Lord Townsend versus Hughes.

A Mation upon the Stat. de Scandalis Magnatum, for these words, viz. My Lord Townsend is an unworthy Person, and does things against Law and Reason. Apon still Mot Guilty, there was a Aerdia for the Plaintist, and four thousand pounds damages given. The Defendant moved sor a new Trial, because of the excessiveness of the damages: and a President was cited of a new Trial granted upon that ground, and no other. And Atkins was sor granting a new Trial. North, Windham and Scroggs control that the Jury are the sole Judges of the damages.

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At another day it was moved in arrest of Judgment, That the words are not actionable: And of that Dpinion was Atkyns. But North, Windham & Scroggs contr. And so the

Plaintiff had Judgment.

Atkyns. The occasion of the making of the Stat. of 5 Rich. 2. appears in Six Robert Cotton's Abr. of the Records of the Tower, fol. 173. num. 9. 10. he says there, That upon the opening of that Parliament, the Bishop of St. Davids in a Speech to both Poules veclared the Causes of its being summoned, and that amongst the rest one of them was to have some restraint last upon Slanderers and Sowers of Discozd: which sozt of men were then taken notice of to be

very frequent. Ex malis moribus bonæ Leges.

The Preamble of the Act mentions false News and horrible Lyes, &c. of things, which by the faid Prelates, &c. were never said, done nor thought. So that it seems designed against telling stories by way of Mews concerning them. The Stat. does not make or declare any new Offence. does it inflict any new Punishment. All that seems to be new is this, 1. The Offence receives an aggravation, because it is now an Offence against a politive Law, and consequently deferbes a greater Punishment; as it is held in our Books, That if the King prohibit by his Proclamation, a thing prohibited by Law, that the Offence receives an aggravation by being against the King's Proclamation. 2. Though there be no express Action given to the party grieved, yet by operation of Law the Action accrews. For when ever a Statute prohibits any thing, he that finds himfelf grieved, may have an Action upon the Statute 10 Rep. 75. 12 Rep. 100. there this very Case upon this Statute was agreed on by the Judges. So that that is the fecond new thing, viz. a further remedy, An Action upon the Stat. 3. Since the Stat. the party may have an Action in the tam, quam. Which he could not have before. Row every lye or fallity is not within the Stat. It must be horrible, as well as false. We find upon another occasion such a like distinction; It was held in the 12 Rep. 83. That the Digh-Commission Court could not punish Adultery; because they had Jurisdiction to punish enormous Offendors only. So that great and horrible are words of distinction.

Again, it extends not to imall matters, because of the ill consequences mentioned; Debates and Discord betwixt the

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faid Lords, &c. great peril to the Realm, and quick subversion and destruction of the same. Every word imports an aggra-The Stat. poes not extend to words that do not agree with this Description, and that cannot by any reasonable probability have fuch vire effects. The Cales upon this Statute are but few and late, in respect of the antiquity of It was made Anno 1379. for a long time after we bear no tydings of an Action grounded upon it. And by teading it one would imagine, that the makers of it never intended that any hould be. But the Action arises by opetation of Law; not from the words of the Ad, nor their intention that made it. The first Cafe that we find of an Action brought upon it, is in 13 H. 7. which is 120 years after the Law was made: so that we have no contemporanea expositio. which we often affect. That Tale is in Keil. 26. the next in 4 H. 8. where the Duke of Buckingham recovered 401. against one Lucas, for faying that the Duke had no more confcience than a Dog; and so he got money, he cared not how he came by it. he cited other Cales, and faid he oblerbed, Chat where the words were general, the Judges did not ordinarily admit them to be actionable; otherwise, when they charged a Peer with any particular miscarriage. Serjeant Maynard observed well, That the Mobility and great men are equally concerned on the Defendants part : for Actions upon this Statute lie against them, as well as against the meanest Subjed. Ads of Parliament have been tender of racking the King's Subjects for words. And the Scripture discountenances mens being made Transgressors for a word. I obferve that there is not one case to be met with, in which upon a motion in arrest of Judgment, in such an Auton as this, the Defendant has prevailed. The Court hath sometimes been vivided: the matter compounded: the Action has abated by death, ec. but a politive Rule that Judgment thould be arrefted we find not. So that it is time to make a Prefivent, and fir some Rules according to which men man demean themselves in converte with great persons. Misera est servitus, ubi jus est vagum. Since we have obtained no Rules from our Predeceslogs in Actions upon this Statute. we had best go by the same Rules that they old in other Actions for words. In them, when they grew frequent, tome bonnos and limits were let, by which they endeaboured to make these Law certain. The Actions now encrease. The ffream

ffream seems to be running that way. I think it is our part to obviate the mischief. So he was of Opinion, That the Judgment ought to be arrested; but the Court gave Judg-

ment for the Plaintiff.

North. There are three sorts of Hab. Corp. in this Court, 1. Hab. Corp. ad respondendum, and that is, when a man hath a cause of suit against one, that is in prison, he may bring him up hither by Hab. Corp. and charge him with a Declaration at his own suit. 2. There is a Hab. Corp. ad faciendum & recipiendum, and that Desendants may have, that are sued in Courts below, to remove their Causes before us. Both these Hab. Corp. are with relation to the suits properly belonging to the Court of Common Pleas. So if an inferiour Court will proceed against the Law, in a thing of which we have Conisance, and commit a man; we may discharge him upon a Hab. Corp. this is still with relation to Common Pleas. A third sort of Hab. Corp. is sor priviledged Persons. But a Hab. Corp. ad subjiciendum is not warranted by any Presidents that I have seen.

Hh 2 Term.

Term. Pasch. 29 Car. II. in Communi Banco.

Hall & Booth.

Orth. In actions of Debt, &c. the first Process is a Summons, if the Defendant appears not upon that, a Cap. goes, and then we hold him to Bail. The reason of Bail is upon a supposition of Law, that the Defendant sties the Judgment of the Law. And this supposition is grounded upon his not appearing at the sirst. For if he appear upon the Summons, no Bail is required. And this is the reason, why it is held against the Law for any inferiour Court, to issue out a Capias for the sirst Process. For the liberty of a man is highly valued in the Law, and no man ought to be abytoged of it, without some default in him.

A Church is in decay, the Bishops Court must proceed against the whole Parish, to have it repair'd: they cannot Rate any particular person towards the repair of it. the Church-wardens must summon the Parish; and that needs not be from house to house, but a general publick Summons at the Church is sufficient : and the major part of them that appear, may bind the Parity. If the Church and Chancel be out of repair, the Parissioners are only chargeable to be contributory towards the Repairs of the Navis Ecclesia. If a Livel be against the Parish, for not repairing the Church, though the word Ecclesia, may include the Chancel, yet we will not grant a Prohibition. If a Car be let by the major part of the Parish, pro reparatione Ecclesia, it is well enough: and afterward any part of the money raised be last out upon the Chancel, the Parish ought not to allow it upon the Church-wardens accounts. But if a Car be imposed express for the repair of the body of the Church, and of the Chancel, we will not fuffer them to proceed. De if a Libel be against a Parish for not repairing the Navis Ecclefize and the Chancel, we will probibit

them. If a Church be down, and the Parish encreased, so that of necessity they must have a larger Church, the major part of the Parish may raise a Car for the enlarging it, as well as the repairing it, per Cur. It was insisted on at the Bar, that to a Car for the encreasing of a Church, the confent of every Parishioner must be had. But the Court was of another Opinion.

Southcote & Stowell, Super Mich. 28 Car. 2.

Aldw. for the Plaintiff. Thomas the Covenantoz may be said to take an Estate for life by implication, and then it will be all one as if an express Estate for life had been limited to him, with a remainder to his heirs males, which would be a fie-tail executed in himself: and if so, then William has a good Title: I And. 265. the Lord Paget's Case, I Rep. 154. in the Rector of Chedington's Case, Fenwyke and Mittfords Case, Moor. 284. I And. 256. & Cr. Eliz. 321. Hodgekinson and Wood's Case, I Cr. 23. Lane and Pannell's Case, I Rolls.

But if this will not hold, then William may take an estate by way of a future springing use: for this be quoted 2 Rolls,

Uses, p, 794. Mills and Parsons, num. 7.

If neither of these ways will serve, yet the remainder to the Beirs males of Thomas, may best in Edward (for Six Popham died in the Covenantor's life-time) and William may take by descent, as special Beir per formam doni, though he he not Beir of the body of Edward, in whom the remainder sirst bests.

Stroud contr. The limitation of a remainder in tail to the Peirs males of the Covenantoz, is bad in its oxiginal creation. For no man can make himself or his own Peirs Purchasers, without departing with the whole Faismple, Dyer 309. b. 42 Aff. 2. I H. 5. 8. per Skrene, 24 Ed. 3. 28. Bro. Estates 23. I H. 8. 65. per Hull, 42 Ed. 3. 5. Br. Estates 66. Dyer 69. b. 2 H. 5. 4. b. I H. 5. 8. 14 H. 4. 32. a. Cook 2 Inst. 333. I Inst. 22. b. 32 H. 8. Bro. Livery 61. but all these Cases are of Estates passed by Conveyance at Common Law, and not by way of use. But Ales are directed

by the Rules of the Common Law, and as to the besting of them differ not from Estates conveyed in possession. I Rep. 138. Chudleigh's Case. Mo favourable construction ought to be made for Ales against a Rule of Law. The Stat. of H.8. feems intended to extirpate all private Afes, and was in reflitution of the Common Law. De cited the Earl of Bedford's Case, 1 Rep. 130. a. Poph. 3 & 4. & Moor. 718. and Fenwyke and Miltford's Case, I Inft. 22. b. If Thomas took any effate by this fettlement, he took a fer fimple. For no estate being limited to him, if he took any, the Law bested Now the act of Law will not settle in him an Estate tail, which is a fettered Estate, but a fæstimple, if any thing. And the rather, because the reason of it must be upon a supposition, that the old alse continues still in him, being never well limited out of him. Then he argued, that admitting the limitation to be good, yet lince it beffed in Edward as a Purchasoz, it is spent by his dying without iffue.

But North, Windham and Atkins were of Dpinion, That if an Estate limited to a man and the Peirs of the body of his Father, vest in him, be it either by descent of purchase, that if he die without issue, it shall go to his Brother, ac. so that in this case, if the remainder to the Peirs males of Thomas, ever vested in Edward, it comes to William, as Peir male of the body of Thomas, and he is a special Peir to take by descent.

2. They agreed that at the Common Law a man could not make his right Deir a Purchasoz, without parting with the whole see; but that by way of Ase might: Creswold's Case in Dyer is of an Estate executed. They agreed the limitation of the remainder in this case to be good, and that

ir vested in Edward, as a Purchasoz.

North. It cannot take effect as a springing Ale; because where the limitation is of a remainder, the Law will never construct to, as to support it any other way. This (he said) he had known resolved in one Cutler's Case in the Kings Bench.

Scroggs agreed to the Judgment; but faid, he went contrary to the Boks in so doing: which go upon nice and subtile differences, little less than Petaphysical.

Justice versus Whyte.

In an Action of Debt against the Defendant, as Executor to to John Whyte, the Defendant pleaded, That John bid make a Will, but made not him Executor, and that the said John had bona notabilia in divers Diocesses, and that the Archbishop of Canterbury committed Administration to the Defendant, and concluded in bar, to which there was a demurrer.

Serjeant Turner. 1. This is a plea in a abatement only, and the Defendant has concluded in bar, Cr. Eliz. 202. Isham & Hitchcot. 2. The Defendant does not traverse, absque hoc that he ever administred as Executor, 20 H. 6. 1. b. per Fortescue. 3. The Defendant does not thew when Administration was committed to him: for if it were committed hanging the West, it will not abate it, 21 H. 6.8. 5 H.5.10,11. Br. tit. Executors 7.4. Hob. 49. 4. The Defendant does not lay it expletly that John Whyte died intestate: but only fays, that he made a Will, but did not appoint bim, the Defendant to be his Executor by that Will, and that Administration was granted to him. Row also the Defendant was not made Executor by the Will, pet he might have been made lo, by a Codicil annexed to the Will, Rolls Rep. 2 part 285. 5. De says not in what Pro-bince the bona notabilia were: and perhaps they were in the Province of York. The Court gave Judgment for the Plaintiff, nisi causa, &c. chiefly for the first and fourth Reasons.

Page & Tulle.

Idd', sc. Henricus Tulse nuper de Lond' Miles, & Robertus Jeffries nuper de Lond' Miles, nuper vicecom' Com' prædict' attachiati suer ad respondendum Thomæ Page de placito transgress. super casum, &c. & unde idem Tho. per Bale Attornatum suum queritur, quare cum quidem Sam. Wadham

ham, alias Waddam, Term. Sanct. Trin. Ann. Regni Dom. Regis nunc vicesimo sexto, & antea indebitatus suisset eidem Tho. Page in 34 libris monetæ Angliæ, idemque Tho. pro obtentione earund' eodem Term. Sanct' Trin, anno vicesimo sexto supradict' debito modo prosecutus fuisset extra Cur Domini Regis nunc coram ipso Rege (eadem curia apud Westmonast' in prædict' Com' Midd tunc existente) quoddam præceptum ipsius Domini Regis versus prædict' Samuelem, Vicecom' Midd' direct. per quod eid. tunc Vicecomiti præcept fuit, quod caperet præfatum Samuelem, si &c. & eum salvo, &c. ita quod haberet corpus ejus cor dict. Dom. Rege apud Westmonast. die Veneris prox. post tres septimanas Sancti Mich. prox' sequent ad respondendum eidem Tho. de placito transgr ac etiam billæipsius Tho. versus prædict' Sam. pro triginta quatuor libris super asfumptionem secund' consuetud' Cur dict' Dom' Regis cor ipso Rege exhibend' & quod idem vicecomes haberet ibi tunc præceptum illud, &c. quod quidem præceptum idem Thomas postea & ante return' ejusd', scil. quarto die Jul. anno vicesimo sexto supradict' apud Westmonast' in Com. prædict' præsat Henric & Roberto tunc Vicecom' prædict' Com' Midd deli-beravit, ea intentione quod prædict' Samuel virtute præcepti illius caperetur & arrestaretur, & ad præd. diem return ejusdem in dict' cur' dict' Dom' Regis coram ipso Rege secundum consuetudinem ejusdem cur' custodiæ Marischalli Marischalciæ Dom' Regis cor' ipso Rege committeretur, ad intentionem quod idem Tho. versus præfat Samuel. custodiæ ejusdem Marischalli Marischalciæ sic commissum, & in custod' sua existent secund' consuetudinem dict' Cur' dict' Dom' Regis coram ipso Rege per bilt ipfius Tho. versus præd' Samuel. in eadem Cur' exhibend' in placito transgressionis super casum super assumptionem ipfius Sam. pro præd. 34 libris eid. Tho. folvend' & pro recuperatione earund' parraret & implacitaret, & quod præd' Sam. antequam ipse ab hujusmodi custod' prædict' Marischall' Mariscalciæ deliberetur aut ad largum ire dimitteretur, imponeret in eadem Cur' in præd' placito transgressionis super cafum sufficientes manucaptores eid. Tho. inde responsur' secund' consuetudinem Cur' illius, virtute cujus quidem præcepti prædictus Henricus & Robertus postea & ante return ejusdem, scil. 14 die Julij ann. 26 supradict' tunc vicecom' Com' præd' ut præfertur, existentes præsat Samuel, apud Westmonaster' prædict' in Com' prædict' ceperunt & arrestaverunt, & ipsum Samuel. in custodia sua ex causa prædict habuerunt & detinuerunt

nuerunt, prædicti tamen Henricus & Robertus, officij sui Vicecom' debitum in vera & justa executione præcepti istius, iis, ut præfertur, direct' & deliberat, minime curantes, sed machinantes ipsum Thomam minus rite prægravare, & in prosecutione sectæ suæ prædictæ penitus frustrare, & de assentione & obtentione prædict' 34 librarum omnino impedire, prædict. Samuelem in custodia sua in forma prædict' detent existent (eodem Thoma de prædict' 34 libris seu aliquo denario inde minime satisfacto) fine licentia & contra voluntatem ipsius Thomæ vicesimo secundo die Septembris Ann. 26 supradicto, apud Westm' præd' extra custodiam ipsorum Henrici & Roberti tunc Vicecom' Com' prædict' existent ad largum ire quo voluit libere & voluntarie ire & evadere permiserunt, & nihilo minus ad præd. diem returni præcepti præd' ipfi præctid' Henricus & Roberus Vicecom' præd' Com' Midd', ut præfertur, existentes, in prædict' Cur dicti Dom. Regis, coram ipso Rege apud Westmonaster' prædict' in ipsius Tho. grave damnum & præjudicium falso & fradulenter returnaverunt præceptum prædict. in forma sequente, viz. quod ipse virtute cujusdam brevis sibi direct. cepisset corpus prædict. Samuelis, cujus quidem corpus ad diem & locum in eodem præcept content cor dict' Domino Rege parat habuerunt, prout per idem præcept sibi præcipiebatur, ubi revera prædict. Henricus & Robertus corpus prædicti Samuelis, ad locum in præcept prædict. content non parat habuerunt juxta exigentiam præcept prædict. & return suum prædict. sed prædictus Samuel post evasionem suam prædict. seipsum ad loca eidem Thomæ penitus incognita elongavit & retraxit, quorum prætexť idem Tho. non folum in profecutione secta sua pradicta manifesto retardatus existit, verum etiam de obtentione prædictar 34 librarum ei, ut præfertur debit omnino impeditus & defraudatus existit, ad dampum ipsius Tho. 40 librarum & inde producit sectam.

Et prædictus Henricus & Robertus per Joh. Tister Attornatum suum veniunt & Desendunt vim & injuriam quando, &c. & dicunt quod prædictus Thomas actionem suam prædictam inde versus eos habere seu manutenere non debet, quia dicunt quod cum per quendam Actum in Parliamento Domini Henrici nuper Regis Angliæ, &c. sexti post conquestum, apud Westomaster in Com. Midd. 24 die Februarij anno Regni sui 23 Tent editum, inter alia inactitatum existit authoritate ejustem Parliamenti quod Vicecomes, sub-vicecomes,

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Clericus Vicecom Seneschallus sive Ballivus Franchesiæ vel Ballivus five Coronator non caperet aliquid colore Officii per ipfum nec per aliquam personam ad ejus usum de aliqua persona pro confectione alicujus return five panell. & pro copia ejusd panell. præterquam 4 denarios, & quod prædict. Vicecomes & omnes alii Officiar & Ministri prædicti emitterent extra prisonam, Angl. should let out of passon, omnimodas personas per ipsos vel eorum aliquos arrestat. seu existent in eorum Custodia vigore alicujus brevis billæ sive warrant. in aliqua actione personali vel causa indictamenti pro transgressione, super rationabili securitate sufficientium personarum habentium sufficiens infra Com ubi tales personæ sint, ad ballivum sive manucaptionem tradit. ad custodiend. dies suos in talibus locis, prout prædict. brevia, billæ five warranta requirerent, tali persona sive personis quæ fuit vel forent in corum custodia per condemnation, execution, cap. utlagatum five excommunicat. & pro securitate pacis, & omnibus talibus personis quæ forent Commiss. ad custod. per speciale mandatum aliquorum Justiciariorum, & vagrantibus recusantibus ad serviendum secundum sirmam Statuti de laboratoribus tantummodo exceptis, prout per actum prædictum plenius apparet, & iidem Henricus & Robertus ulterius dicunt quod ipsi decimo quarto die Julii anno Regni dicti Dfii Regis nunc, &c. vicesimo sexto supradict. in dicta narratione superius specificat. iisdem Henr. & Roberto tunc Vicecom' Com' præd. existentibus, apud Parochiam S. Clementis Dacorum in Com præd. ceperunt & arrestaverunt prædictum Samuelem Wadham virtute præcepti prædicti in narratione prædict. superius specificat. ac ipsum ad prisonam dicti Dom. Regis sub custodia Vicecom. Com. præd. tunc existent. tunc & ibidem commiserunt, prædictoque Samuele sub custodia prædict. Henr. & Roberti existent. pro eadem causa & pro nulla alia causa, prædict. Sam. Wadham postea & ante return. præcepti illius, scil. prædicto decimo quarto die Julii anno vicesimo sexto supradicto apud paroch. prædict'in Com' prædict' invenit & obtulit prædict' Henrico & Roberto adtunc Vicecom' Com' prædict' existentibus rationabilem securitatem sufficentium personarum habentium sufficiens infra Com' prædict' Middlesex ad servandum diem suum prædict' in præcepto prædict' superius specificat. ad radum præsato Tho. de placito transgreffionis ac etiam billæ ipfius Tho. verfus præfatum Samuelem pro triginta quatuor libris super assumptioem secundum consuetudinem Cuf ipsius Dni Regis coram ipso Rege exhibend' secundum exigentiam præcepti illius, viz. Willielmum King de paroch. Sancti Martini in campis in Com' Middlesex Generos. & Tho. Williams de eadem paroch. in Com prædict. Taylor, qui quidem Willielmus King & Tho. Williams eundem Samuelem ad tune manucapere obtulerunt quod ipse idem Sam. Wadham compareret coram dicto Dño Rege apud Westmon. die veneris prox' post tres septimanas Sancti Mich. prox' sequent, ad respondend. præfat. Tho. Page de placito transgressionis & billæ prædict. in narratione prædict. superius specificat. secundum formam & effectum actus prædicti; & iidem Henr. & Robertus ulterius dicunt, quod postea & ante returnum præcepti prædicti scil. prædicto decimo quarto die Julii ann. vicesimo sexto supradicto iisd' Henf & Roberto tunc Vicecom Com præd. existent. apud paroch Sancti Clementis Danof præd' vigore Statut. præd. cep. de præfat' Samuele rationabilem securitatem prædiæ', viz. Willielmum King & Tho. Williams qui quidem Willielmus King & Tho. Williams iisdem die & anno apud paroch. prædict' Sancti Clementis Danof in Com prædict. per quoddam Scriptum suum obligatorium subfigill. prædictof Willielmi King & Tho. Williams, cujus dat. est decimo quarto die Jul. ann. vicelimo fexto supradict. concessissent & quilibet eorum concessit se teneri præsato Henric. & Robert. ut Vicecom Com præd' in summa 70 librar bonæ & legalis monetæ Angliæ cum conditione eidem Script. Obligator subscript quod prædict. Samuel compareret coram dicto Dom Rege apud Westmonast. prædict. die veneris prox' post tres septimanas Sancti Michaelis prox' fequent. ad respondend' præsato Tho. Page de placit' transgressionis & billæ prædict' secundum exigentiam præcepti prædicti & superinde ad tunc & ibid' emiserunt præfat' Sam extra prisonam prædict' secundum formam Statuti prædict' ut eis bene licuit, quæ est eadem ad largum ire permssio prædict' unde præd' Tho. Page superius versus eos queritur & ulterius idem Henr. & Robert. dicunt quod ipsi postea scil. ad diem returni ejusdem præcepti coram dicto Dño Rege apud Westmonast' prædict. iisdem Henr & Robert. tum Vicecom Com præd. existent. returnaverunt præceptum prædictum quod ipsi virtute præcepti prædicti cepissent præfatum Samuelem cujus corpus coram dicto Dom Rege ad diem & locum in eodem præcept. content. parat. habuerunt, prout per idem præcept. præcipiebatur, & hoc parati sunt verificare, unde petunt judicium & damna fua occasione prædict. sibi adjudicand'.

Et prædict. Tho Page dicit quod ipse per aliqua per prædict. Henric. & Robert. superius placitando allegat. ab actione sua prædict. versus præd. Henr. & Robert. habend, præcludi non debet,

quia protestando quod prædict. Henr. & Robert. non ceperunt securitatem sufficientium personarum pro comparentia prædict. Samuelis ad diem & locum in præcepto præd. superius specificat, prout præd. Henr. & Robert. superius placitando allegaverunt, pro placito idem Thom. dicit quod iidem Henr & Robert. corpus præfati Samuelis ad diem & locum in præcept. præd. content. cor dicto Dño Rege non parat, habuerunt juxta exigentiam præcepti prædict. & returnum suum prædict. & hoc paratus est verificare, unde petit judicium & damna sua occasione præmissorum sibi adjudicari.

The Defendants bemur to this replication, and the Plain-

tiff joins in demurrer.

Serjeant Strode pro Defendente. Before the Statute of Westm. 2. cap. 10. no man could make an Attorney without the Kings Wirit de Attornato faciendo: and there was no other return at the Common Law then cepi corpus, or non est inventus. Vide 32 H. 6. 28. The Statute of 32 H. 6. both not alter the Return. The delign of that Statute is only to provide for the Defendants eale, and against the extortion of Sheriffs and their Officers: so that the Sheriff being obliged to return a Cepi, and yet to let the Defendant to bail, there can be do reason why he should be charged for not having the body at the day. De cited Langton & Gardners case Cr. Eliz. 460. Barton & Aldworth: Cr. Eliz. 624. in Bowles & Laffel's case, ibid. 852. The Sheriff took ball according to this Statute, and returned a languidus in prisona, though the Defendant was at large: refolved that no Action lay against the Sheriff. Trin. 13 Jac. Rolls Abr. 1. part 92. no Action lieg against the Sherist for not having the body at the day, because he is compellable by the Statute to let him to bail: and to he faid it was resolved in a case between Francklyn & Andrews Br. 24 Car. 1. but adjudged for the Plaintiff upon the infufficiency of the pleading.

Serjeant Conyers to the Plaintiff. I agrée that an Action of Cicape will not lie against the Sherist, because he is compellable to let him to bail: but this is an Action at the Common Law for a false Return; which if it should not be maintainable, the design of the Statute would be destraided: for the Plaintist cannot controll the Sherist in his taking bail, but he may take what persons and what bail he pleaseth: and if he should not be chargeable in an Action for not having the body ready, the Plaintist could never have the effect of his Suit:

and although the Sheriff be chargeable, he will be at no prejudice; for he may repair his loss by the bail-bond: and it is his own fault if he takes not fecurity sufficient to answer the The last clause in the Statute is, That if any Sheriff return a Cepi corpus or reddidit se, he shall be chargeable to have the body at the day of the Return, as he was before, &c. that (if) implies a Liberty in the Sherist not to return a Cepi corpus of reddidit se. But notwithstanding, by the opimon of North Chief Justice, Wyndham & Atkyns Justices, the Plaintiff was barred. Bowles & Lassel's case, they said, was a ffrong case to govern the point; and the return of paratum habeo is in effect no moze then if he had the body ready to bying into Court, when the Court thould command him; and it is the common practice only to amerce the Sheriff till he voes bring in the body: and therefore no Action lies against him; for it is not reasonable that he should be twice punished for one Offence, and that against the Court only. Scroggs delivered no Opinion: but Judgment was given, ut sup.

Cockram & Welby.

A Ction upon the Case against a Sherist, for that he levied such a sum of money upon a Fieri facias at the Suit of the Plaintist, and did not bring the money into Court at the day of the return of the Mitt, Per quod deterioratus est, & dampnum habet, &c. the Defendant pleads the Statute of 21 Jac. of Limitations. To which the Plaintist demurs.

Serjeant Barrell. This Action is within the Statute. It ariseth ex quali contractu: Hob. 206. Speak & Richard's case. It is not grounded on a Record, for then nullum tale Recordum would be a good plea; which it is not: it lies against the Executors of a Sherist, which it would not do, if it arose ex malescio.

Pemberton. This Action is not brought upon the Contract; if we had brought an Indebitatus Assumplit, which perhaps would lie, then indeed we had grounded our felbes upon the Contract, and there had been more colour to bring us within the Statute; but we have brought an Action upon the case for not having our money here at the day, Per quod, &c.

North.

North. An Indebitatus Assumplit would lie in this case against the Sherist of his Executor; and then the Statute would be pleavable. I have known it resolved, that the Statute of Limitations is not a good plea against an Actorny, that brings an Action for his fees, because they depend upon a Record here, and are certain.

Dert Trinity Term, the matter being moved again, the Court gave Judgment for the Plaintiff, Nisi causa, &c. if the Fieri facias had been returned, then the Action would have been grounded upon the Record, and it is the Sherists fault that the Clitic is not returned: but however the Judgment in this Court is the foundation of the Action. Debt upon the Stat. of 2 Edw. 6. for not setting out Tythes, is not within the Stat. for oritur ex malescio: so the ground of this Action is malescium, and the Judgment here given. In both which respects it is not within the Statute of Limitations.

Barrow & Parrot.

Arrot had married one Judith Barrow an Defreis. Sir Herbert Parrot, his father, and an ignozant Carpenter. by vertue of a dedimus potestatem to them directed, took the conusance of a fine of the said Judith, being under age, and by Indenture the use was limited to Mr. Parrot and his wife for their two lives, the remainder to the Beirs of the Surviboz; about two years after the wife died without iffue; and Barrow as heir to her prayed the relief of the Court. Apon examination it appear'd, that Sir Herbert did examine the woman whether the were willing to levy the fine? and asked the husband and her, whether the were of age or not? both answered that the was. She afterwards, being privately eramin'd touching her consent, answered as before, and that the had no constraint upon her by her husband, but the was not there queftion'd concerning ber age. Sir Herbert Parrot was not examined in Court upon Dath, because be was accused; and North faid, this Court could no moze administer an Dath ex Officio, then the Spiritual Court could. North & Wyndham. There is a great truft repoled in the Commiffioners,

and they are to inform themselves of the parties age; and a boluntary ignozance will not excuse them. But Atkyns opposed his being sined: he cited Hungates case, Mich. 12 Jac. Cam. Stell. 12. Cook, 122, 123. where a fine by Dedimus was taken of an Infant, and because it was not apparent to the Commissioners, that the Infant was within age, they were in that Court acquitted. But North, Wyndham & Scroggs agreed, that the Son should be fined; for that he could not possibly be presumed to be ignozant of his Wises age. Atkyns contra. But they all agreed, that there was no way to set the fine aside.

Term.

Term. Trin. 29 Car. II. in Communi Banco.

Searle & Long.

Uare Impedit against two; one of the Desenvants appears; the other cassan essoyn: wherefore he that appears had idem dies; then he that was essoyn'd appears, and the other cass an essoyne. Afterward an issued for their not Attachment appearing at the day; and so Process continued to the great distress: which being return'd, and no appearance, Judgment sinal was ordered to be entred according to the Statute of Marlebr. cap. 12.

It was moved to have this rule discharged, because the party was not summoned, neither upon the Attachment not the great distress, and the Sureties returned upon the Process were John Doo & Richard Roo: an Affidavit was produced of Non-summons, and that the Defendant had not put in any Sureties, not knew any such person as John Doo & Richard Roo.

It was objected on the other fide, that they had notice of the fuit; for they appeared to the Summons; and it appeared that they were guilty of a voluntary delay, in that they forched in efloyne: and the Stat. of Marlebr. is peremptory;

wherefore they prayed Judgment.

Serjeant Maynard for the Defendants. If Judgment be entred against us, we have no remedy, but by a Alrit of Deceit. Now in a Alrit of Deceit the Sumners and veyors are to be examin'd in Court: and this is the Trial in that Action: but feigned persons cannot be examined. It is a great abuse in the Officers to return such feigned names. The first cause thereof was the ignozance of Sheriss, who being to make a return, looked into some Book of Presidents sor a form; and sinding the names of John Doo and Rich. Roo put down sor examples, made their return accordingly, and took no care sor true Sumners and true Manucaptors. For Non-appearance at the return of the great Distress in a plea of Quare Impedit,

final Judgment is to be given, and our right bound for ever, which ought not to be luffered, untels after Process legally ferved, according to the intention of the Statute. In a cafe Mich. 23. of the prefent King, Judgment was entred in this Court in a plea of Quare impedit, upon non-appearance to the great Diftres ; but there the party was summoned, and true Summoners returned; upon non-appearance an Attach: ment iffued, and real Sumners return'd upon that: but upon the Diffres it was return'd, that the Defendants districti fuerunt per bona & catalla, & manucapti per Joh. Doo & Rich. Roo: and for that cause the Judgment was vacated. Cur'. The design of the Statute of Marlebridge was to have Procels duly executed, which if it were executed as the Law requires, the Tenant could not possibly but have notice of it. Foz, if he do not appear upon the Summons, an Attachment goes out; that is a command to the Sheriff to leize his body, and make him give Sureties for his appearance: if yet he will not appear, then the great diffress is awarded; that is, the Sheriff is commanded to feize the thing in question; if he come not in for all this, then Judgment final is to be given. Row the iffue of this Process being so fatal, that the right of the party is concluded by it, we ought not to luffer this Process to be changed into a thing of course. It is true, the Defendant here had notice of the Suit; but he had not fuch notice as the Law does allow him, And for his fourthing in effoyn, the Law allows it him. Accordingly the Judgment was fet alide.

Anonymus.

Alse Judgment out of a County Court; the Recozd was vitious throughout, and the Judgment reversed; and ordered that the Suitors should be amerced a Wark: but the Record was so imperfectly drawn up, that it did not appear before whom the Court was held: and the County Clark was fined five pounds for it.

Cessavit per biennium: the Defendant pleads Non-tenure. De commenceth his plea, quod petenti reddere non debet: but

concludes in abatement.

Term. Trin. 29 Car. II. in C. B.

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Serjeant Barrell. He cannot plead this plea, for he has impatied. Cur. Non-tenure is a plea in bar: the conclusion inverse is not good; but he shall amend it.

Barrell. Non-tenure is a plea in abatement. The difference is betwirt Non-tenure, that goes to the tenure (as when the Tenant denies that he holds of the demandant, but fays that he holds of some other person; which is a plea in bar) and Non-tenure that goes to the Tenancy of the Land: as here he pleads that he is not Tenant of the Land: and that goes in abatement only. The Defendant was ordered to amend his plea.

Addison versus Sir John Otway.

Kirby-Marleston in the Towns of A. B. & C. Tenant in Tail makes a Deed of bargain and sale to J. S. to the intent to make J. S. Tenant to the Præcipe, in order to the suffering of a common Recovery of so many Acres in the Parishes of Rippon & Kirby-Marlestone. Down in those Parishes there are two Towns called Rippon & Kirby-Marlestone; and the Recovery is suffered of Lands in Rippon & Kirby-Marlestone generally; all this was found by special Acrdia: and surther, that the intention of the parties was, that the Lands in question flould pass by the said recovery, and that the Lands in question are in the Parishes of Rippon & Kirby-Marlestone, but not within the Townships: and that the bargainoz had no Lands at all within the said Townships. The question was, whether the Lands in question should pass by this Recovery or not?

Shaftog: They will pass. The Law makes many strained constructions to support common Recoveries, and abates of the examels, that is required in adversary Suits. 2 Rolls 67. 5 Rep. Dormer's case. Eare & Snow, Plo. Com. Sir Moyle Finche's case, 6 Rep. Cr. Jac. 643. Ferrers & Curson. In Stork & Foxe's case: Cr. Jac. 120, 121. where two Ailles Walton & Screet were in the Parish of Street; and a man having Lands in both, sevied a fine of his Lands in Street, his Lands in Walton would not pass: but there the Conusor had Lands in the Town of Street to satisfie the grant: but in

our

our case it is otherwise. De cited also Rolls Abridgm. Grants 54. Hutton 105. Baker & Johnson. The Deed of bargain and sale, and the Recovery, make up in our case but one assurance, and construction is to be made of both together: as in Cromwells case 2 Report. The intention of the parties Rules, Fines and Recoveries, and the intention of the parties in our case appears in the Deed, and is found by the Aerdict. Rolls Abridgm. 19. 2 part. Winch. 122. per Hob. Cr. Car. 308. Sir George Symond's case: betwirt which last case and ours all the difference is, that that case is of a Fine, and ours of a Common Recovery: betwirt which Conveyances, as to our purpose, there is no difference at all. Pe cited Jones & Wait's case, Trin 27 Car. 2. in this Court, and a case 16 Reg. nunc, in B. R. when Hide was Chief Justice, betwirt Thynne & Thynne.

North. The Law has always fluck at new niceties, that have been flarted in cases of Kines and Common Recoveries, and has gotten over almost all of them. I have not yet seen a case that warrants the case at Bar in all points. Roz do I remember an Authority expressy against it: and it seems to be within the reason of many former resolutions. But we must be cautious how we make a surther step.

Wyndham. I think the Lands in question will pass well enough: and that the Deed of bargain and sale, which leads the uses of the Recovery, does sufficiently explain the meaning of the words Rippon & Kirby Marlestone, in the recovery. I do not so much regard the Juries having found what the parties intention was, as I do the Deed it self, in which he expesses his own intention himself: and upon that I ground my Opinion.

Atkyns agreed with Wyndham. Indeed when a place is named in legal proceedings, we do prima facie intend it of a Uille, if nothing appears to the contrary; stabitur prefumptio donec probetur in contrarium. In this case the Edidence of the thing it self is to the contrary. The reason why prima facie we intend it of a Ville, is because as to civil purposes the Kingdom is divided into Villes. We do not intend it of a Parish, because the division of the Kk 2

Kingdom into Parishes is an Ecclesiastical distribution to Spiritual purposes. But the Law in many cases takes notice of Parishes in civil assairs, and Custom having by begrees introduced it, we may allow of it in a Recovery as well as in a Fine.

Scroggs accordant. If an Infant ledy a fine, when he becomes of full age, he shall be bound by the Deed that leads the Ales of the fine, as well as by the fine it self, because the Law looks upon both as one assurance. So the

Court was of Opinion that the Lands did pafs.

It was then suggested, that Judgment ought not to be given notwithstanding; for that the Plaintist was bead. But they faid they would not stay Judgment for that, as this case was. For between the Lessor of the Platitiff and the Defendant there was another cause bepende ing, and tryed at the same Asszes, when this issue was treed, and by agreement between the parties the Clerdict in that cause was not brawn up, but agreed that it should ensue the determination of this Clerdict, and the title to go accordingly. Moid the submission to this Rule was an implicite agreement not to take advantage of flich occurrences as the beath of the Plaintiff in an Ejectione firmæ, whom we know to be no wife concerned in point of interest, and many times but an imaginary person. It was said also to have Judgment, that there lived in the County where the Lands in queffion are, a man of the same name with him that was made Plaintiff. This the Court law was lufficient, and that were there any of that name in rerum natura, thep would intend that he was the Plaintiff.

Cur. case take notice judicially, that the Leslog of the Plaintist is the person interested, and therefore we punish the Plaintist, if he release the Action, of release the damages.

Accordingly Judgment was given.

Anonymus.

DEbt upon an Obligation was brought against the heir of the Obligoz; hanging which Action, another Action was brought against the same Deir, upon another Obligation of his Ancestoz. Judgment is given for the Plaintists in both Actions; but the Plaintist in the second Action obtains Judgment sirst. And which should be sirst satisfied was the question.

Barrel. De shall be first satisfied, that brought the first Action. North. It is very clear, That he for whom the first Judgment was given, shall be first satisfied. For the Land is not bound, till Judgment be given. But if the Deir, after the first Action brought, had aliened the Land, which he had by descent, and the Plaintist in the second Action, commented after such alienation, had obtained Judgment, and afterward the Plaintist in the first Action had Judgment likewise, in that case the Plaintist in the first Action should be satisfied, and he in the second Action not at all.

Mhat if the Sherist return in such a case, that the Defendant has Lands by descent, which indeed are of his own purchase? North. If the Sherists return cannot be trabected, at least the party shall be relieved in an Ejectione firms.

Dominus Rex versus Thorneborough & Studly.

The king brought a Quare Impedit against the Bishop of and Thorneborough and Studly, and declares, That Queen Elizabeth was seised in see of the Advowson of Redriff in the County of Surrey, and presented J. S. that the Quien died, and the Advowson descended to King James, who died seized, ac. and so brings down the Advowson by descent, to the King that now is. Thorneborough the Patron pleads a Plea in Bat, upon which the King demurs.

demurs. Studly the Incumbent pleads, confessing Queen Elizabeths seisin in see in right of her Crown, but says, that the in the second year of her Reign, granted the Advowson to one Bosbill, who granted to Ludwell, who granted to Danson, who granted to Hurlestone, who granted to Thorneborough, who presented the Desendant Studly, and traverseth absque hoc that Queen Elizabeth died seized.

The Defendants Council produced the Letters Patents

of fecundo Reginæ to Bosbill and his feirs.

The King's Council give in evidence a Presentation made by Queen Elizabeth by usurpation anno 34 Regni sui, of one Rider, by which Presentation the Advowson was vested again in the Crown. The Presentation was read in Court; where in the Queen recited, that the Church was void, and that it appertained to her to present.

North Chief Justice. Is not the Queen deceived in this Presentation; for the recites, that it belongs to her to present, which is not true? If the Queen had intended to make an usurpation, and her Clerk had been instituted, the had gained the Fee-simple; but here the recites, that the had

right.

Maynard. Alhen the King recites a particular Title, and has no such Title, his Presentation is void: but not when his recital is general, as it is here. And this difference was agreed to in the Kings Bench, in the Case of one Erasmus

Dryden.

The Defendants Council thewed a Judgment in a Quare Impedit against the same Rider, at the suit of one Wingate in Queen Elizabeths time: whereupon the Plaintist had a witt to the Bishop, and Rider was outled. Wingate claimed unver the Letters Patents of the Second of the Queen, viz. hy a Hant of one Adie to himself; to which Adie one Ludwell granted it, anno 33 Eliz.

Baldwin. It appears by the Record of this Judgment, that a wit to the Bishop was awarded: but no final Judgment is given, which ought to be after the three points of

the wait enquired.

North. Athat is it that you call the final Judgment? there are two Judgments in a Quare Impedit: one that the Plaintiff thall have a writ to the Bishop, and that is the final Judgment, that goes to the right betweet the parties. And the Judgment at the Common Law. There in another

Judgment to be given for Damages fince the Stat. of West. 2. cap. 5. after the points of the writ are enquired of. Which Judgment is not to be given but at the instance of the

party.

Pemberton. This Wingare that recovered, was a ftranger, and had no title to have a Quare Impedit. Dow I take this difference; where the King has a good Title, no recovery against his Clerk, shall affect the King's Title; he shall not be prejudiced by a Recovery, to which he is no party. If the King have a defeatible Title, as in our case by Alurpation, there if the rightful Patron recover against the King's Incumbent, the King's Title thall be bound, though he be not a party: for his Title having no other foundation than a Presentation, when that is once avoided, the Kings Title falls together with it. But though the Kings Title be only by Murpation, yet a Recovery against his Clerk by a ffranger, that has nothing to do with it, shall not predudice the King: covin may be betwirt them, and the King be Dow Wingate had no Right: for he claimed by Grant from one Adie, to whom Ludwell granted ann. 33 Eliz. But we can prove this Grant by Ludwell to have been void, for in the 29th of the Queen he had made a Prior Grant to one Danson; of which Grant we here produce the Incolment. This Grant to Danson was an effectual Grant, for anno 11 Jacobi a Descentation was made by J. R. & Th. Danson, which proves that this Grant took effect, and the Defendant himself deduceth the Title of his own Patron under that

Barrel. Wingate is not to be accounted a stranger; for he makes Title by the Letters Letters Patents of 2 Eliz. so that he encounters the Queen with her own Hant: and his Title under that Hant was allowed by the Court, who gave Judgment accordingly. There was no faint Pleader in the Tase, as appears by the Record, that has been read. And covin shall not be presumed, if it be not alledged. We deduce our Title under the Hant made to Danson, 29 Eliz. in our plea, but that is only by way of inducement to our

traverse.

Cur. By that Judgment temp. Regin. Eliz. the Duiens Title was avoided. The must not presume that Wingate had a Citle. Ex diuturnitate temporis omnia presumuntur solemniter esse acta. That Quare Impedit was brought when the matter was fresh. Wingate, if he had had any. The afferted his Title against Wingate, if he had had any. The Defendant vio not do prudently in conveying a Title to his Patron under the Stant made to Danson: but issue being taken upon the Dukens dying seized, he shall not be concluded to give in Evidence any other Title to maintain the Issue. Apon which Evidence the Jury found for the Defendant, that Queen Elizabeth did not die seized.

North faid, he was clearly of Opinion, That the Kings Title by Afurpation should be avoided by a Recovery against his Clerk, though the Recoverer were a meer stranger.

The Company of Stationers against Seymour.

De Company brought an Action of Debt against Sevmour for printing Gadbury's Almanacks without their Apon a special Aerdict found, the question was, Whether the Letters Patents whereby the Company of Stationers had granted to them the fole printing of Almanacks, were good of not. The Jury found the Stat. of 13 & 14 Car. 2. concerning Dinting. They found a Patent made by King James of the same Priviledge to the Company, in which a former Patent of Queen Elizabeths was recited; and they found the Letters Patents of the King that now Then they found that the Defendant had printed an Almanack, which they found in his verbis & figuris: and that the foid Almanack had all the effential parts of the Almanack. that is printed before the Book of Common Prayer: but that it has some other additions, such as are usual in common Almanacks, &c.

Pemberton. The King may by Law grant the fole-pinting of Almanacks. The Art of Printing is altogether of another confideration in the eye of the Law, than other Trades and Wysteries are; the Prels is a late Invention. But the Erophitancies and Licenticulness thereof has ever since it was first found out been under the care and restraint of the Pagistrate. For great Wischiefs and Disorder would ensue

Dinting

to the Common-wealth, if it were under no Regulation: and it has therefore always been thought fit to be under the Inspection and Controul of the Government. And the Stat. 14 Car. 2. recites that it is a matter of publique Care. England it has from time to time been under the Kings own Regulation, so that no Book could lawfully be printed without an Imprimatur granted by some that derive authority from him to Licence Books. But the question here is not, Whether the King may by Law grant the fole-Printing of all Books; but of any, and of what fort of Books? the fole-printing of Law-Books is not now in question; that seemed to be a point of some difficulty, because of the large extent of such a Patent, and the uncertainty of determining what hould be accounted a Law Book, and what not. And pet fuch a Patent has been allowed to be good by a Judgment in the Poule of Piers. When Sir Orlando Bridgeman was Chief Justice in this Court, there was a question raised concerning the validity of a Grant of the sole-printing of any particular Book, with a Prohibition to all others to print the same, how far it should stand good against them that claim a Property in the Copy paramount to the Kings Grant? and Opinions were divided upon the Point. the Defendant in our Case makes no Title to the Copy; only he pretends a nullity in our Patent. The Book which this Defendant has printed, has no certain Author: and then, according to the Rule of our Law, the King has the property; and by consequence may grant his Property to the Company.

Cur. There is no difference in any material part betwirt this Almanack and that that is put in the Rubrick of the Common-Prayer. Now the Almanack that is before the Common-Prayer, proceeds from a publick Conflitution; it was first fetled by the Nicene Council, is established by the Canons of the Church, and is under the Sovernment of the Archbishop of Canterbury. So that Almanacks may be accounted Precogative Copies. Those particular Almanacks, that are made yearly, are but applications of the general Rules there laid down for the moveable feasts for ever, to every particular year. And without doubt, this may be granted by the King. This is a stronger Case than that of Law-Books, which has been mentioned. The Lords in in the Resolution of that Case relyed upon this, That

Dinting was a new Invention, and therefore every man could not by the Common Law have a liberty of printing Law-Books. And fince Printing has been invented, and is become a common Trade, so much of it as has been kept inclosed, never was made common: but matters of State, and things that concern the Government, were never left to any mans liberty to print that would. And particularly the fole. Printing of Law Books has been formerly granted in other Reigns. Though Printing be a new Invention, pet the use and benefit of it is only for men to publish their Works with more ease than they could before: Wen had some other way to publish their Thoughts befoze Pzinting came in; and forasmuch as Printing has always been under the Care of the Sovernment fince it was first let on foot, we may well prefume that the former way was so too. Queen Elizabeth, King James, and King Charles the First, granted such Patents as these; and the Law has a great respect to common usage. We ought to be guided in our Opinions by the Judgment of the Poule Pers; which is express in the point: the ultimate reloct of Law and Justice being to them. There is no particular Author of an Almanack: and then by the Rule of our Law, the King has the Droperty in the Copy. Those additions of Drognoffications and other things that are common in Almanacks, Do not alter the Cafe; no moze than if a man should claim a property in another mans Copp, by reason of some inconsiderable additions of his own. Accordingly Judgment was given for the Plaintiffs, nifi caufa, &c.

Anonymus.

A Ction of Trespass for taking away four loads of Theat, four loads of Rye, four loads of Barly, four loads of Beans, and four loads of Pease: The Defendant as to part pleaved, Not guilty. And as to the other part sufficied; for that the Plaintist is Rector of the Rectory Importate of Bradwardyne in the County of Hereford, and so bound to repair the Chancel; and that the Chancel being out of Repair, the Bishop of Hereford, after monition to

the Plaintiff to repair the same, had granted a Sequestration of the Tythes, ec. of the Redow, and that the Defendants, being Thurch wardens, had taken them into their hands, and and to justified by vertue of the Sequestration. To which the

Plaintiff bemurred.

Serjeant Barrel. I do not deny but that the Redox of a Rectory Impropriate may perhaps be bound of common right to repair the Chancel. But since the Stat. of 31 H. 8. & 32 H. 8. c. 7. has converted the Tythes of luch Rectories into a Lay. Fee, it has consequently exempted them from the Aurisdiction of the Divinary. A doubt was conceived upon the Stat. of 31 H. 8. whereby Penfions, Proxies and Synodals are faved, what remedy lay for the recovery of them; and it was therefore provided by the Stat. 32 H. 8. that the Church mould be lequeftred. The Poffeffions of Eccleliaftcal Persons were subjected to the Jurisdiction of the Didinary. and might be sequestred in many cases by Process out of the Bishops Courts: but when ever the Possessions of Lapmen were charged with any Ecclefiastical payment of Spiritual charge, the Didinary could not take the Land into his hands, noz meddle with the Possession thereof in any fort; but the confrant ulage was to compel the persons by Ecclesiafical Censures. Anno 1570. there was application made to the Dan to provide a remedy for the Reparation of the Chancets of fuch Churches, whereof the Parlonages were Impeg-Mozeover, he faid, A Sequestration does not bind the Interest, not put the Rector out of possession, the not fubmitting to it is only matter of contempt; and it can no more be pleaded in Bar to an Action of Trespass, than a Sequestration out of Chancery.

Atkyns. I hope not to fee it dawn in question, Whether a Sequeffration out of Chancery may be pleaded in Bar to an Action of Trespals at the Common Law, or no. if it were pleaded, I think we need not scruple to allow such a Plea, by reason the Court of Chancery at Westminster prescribes to grant such a Process. Which is a Court of fuch Antiquity, that we ought to take notice of their Cu-

floms.

Serjeant Baldwin contr. De cited, F. N. B. fol. 50. M. Reg. Orig. 44. b. ibid. 48.a. the Stat. of Circumspecte agatis, 31 Edw. 1. Joh. Diathan in his Commentary upon the legatine Confitutions of Othobone, tit. ne Prælati fructus Ecclesiarum vacantium

vacantium perciperent. Linw. 136. de ædificand. Ecclefiis. The Reparation of the Chancel is onus reale, impositum rebus, non personis. 5th Rep. Caudrie's Case 9. he cited the Stat. of 25 H. 8. cap. 19. Sir John Davie's Reports 70. Vaughan. 327. Reg. Jud. 22. 26. 13 H. 4. 17. 21 H. 6. 16. b. 28 H. 8.

cap. 9.

It is Objected, That these Tythes are become a Lay-fac. To which I answer, That by the Stat. of 32 H. 8. there is a remedy given for them in the Spiritual Court. It is Enacted indeed, That Fines and Recoveries may be luffered of them, as of Lands and Tenemets, but they are not made Lay-fees to other purpoles. Do Statute exempts them from the Jurisdiction of the Didinary, not discharges the The faving in the Stat. of 31 H.8. preferves the onus reale. power of Sequestration, as well as other particulars there For all Rights of any person or persons, their Heirs and Successors is faved, &c. the saving is large. Parishioners have a right in the Chancel, and to have it kept in repair; for the Communion-Table is to stand there: though they have not Jus sepulturæ there. The practice is And this is is the first instance of disobedience to with us. such a Sequestration. Belides there are many Impropriations in the hands of Deans and Chapters, and bodies politick, which cannot be excommunicated: what process will you grant against them but Sequestration? I do not mean Appropriations; to wit, such Rectories as were appropriated to them before the discolution of Monasteries, and have continued to to this day: for there is no question but the Dedinary may sequester them, but I mean such Impropriations as they have purchased of the King and his Patentees since the diffolution.

North. The Bishop is in the nature of an Ecclesiassical Sherist. Is an Action of Debt were brought against a Clerk, and the Sherist had returned upon a Fieri facias, that the Defendant was Clericus beneficiatus non habens Laicum feodum; there issued a Fieri facias to the Bishop, upon which he used to sequester (as they call it) the Ecclesiassical possessions of the Defendant, but that is not properly a Sequestration; sor the Defendant must not return Sequestrari secie he must return Fieri secie or nulla bona, in like manner as a Sherist of a County must do: this I have known in experience, that a Bishop has been ordered in such a case to amend

his

his return. The reason of this Process was, because the posfestions of Ecclefiastical persons were so diffind from Tempozal possessions, that they could not be subject to the ordinary process of the Tempozal Law, no moze than possessions of lay-men could be subject to their Jurisdiction. And therefore Rectories impropriate being now incorporated into the Common Law, and converted into lay fees, It should feem to me, that they are thereby exempted from the Jurisdiction of the Didinary. And this I take to be within the reason of Jeffrie's Case in the 5th Rep. where tempozal persons, that are liable to contribute towards the repairs of the Church, out of their tempozal polfestions, are faid to be compellable thereunto by Ecclesiastical Censures. It has been said, that the Parishioners have a right in the Chancel: but I question that: it is called Cancellum, a cancellis: because the Parishioners are barred from thence. It is the right of the Parson. Windham thought, that by the saving in the Stat. of 31 H.8. the Jurisdiction of the Divinary was preferved. Atkyns. The Parlon was charge. able with the reparation of the Chancel, in respect of the profits which he received. They were the proper Dektors. Row I think it may be held that the Impropriation affects only the Surplulage of the profits over and above all Charges and Duties iffuing out of the Parlonage, and wherewith it was oxiginally charged. The reparation of the Chancel is a right arifing from the first donation: which shall not be taken away but by express words. Scroggs accordant.

North. The Defendants plea is naught; for the cause of their justification is, that what they did was in executing a Sequestration, whereby they were authorized to take into their hands the profits of the Rectory, for the reparation of the Chancel. Now they ought to averr, that they did not take into their hands more than was sufficient for the reparation thereof.

North. If the Law come to be taken as my Brothers are of Opinion, it will make a great step to the giving Ordinaries power to encrease Aicarages. For the Parishioners have a right to a Maintenance for one to preach to them. Adjornatur.

Edwards

Edwards & Weeks.

A Ction upon the cale. The Plaintist declares, that the Defendant in consideration that the Plaintist would deliver unto him such a Pogle, promised to deliver to the Plaintist in lieu thereof another Pogle, or sive pounds upon request: and avers, that the Plaintist had delivered to the Defendant the said Pogle, and had requested him, ec.

The Defendant pleads that the Plaintiff, befoze the Action brought, discharged him of that promise, but says not bow.

To which the Plaintiff Demurred.

Strode. If he had pleaded a discharge befoze the request made, the plea had been good, without shewing how he discharged him: but after the request once made, a verbal request is not sufficient. Cr. Car. Langden & Stokes 384. & 22 Ed. 4.40. b.

Cur acc'. Et judicium pro querente, Nisi causa, &c.

Barker & Keate.

Jectione firme of Land in Castle-acre in Com Norff. The Defendant pleaded not guilty; and the iffue was found as to part : and for the relidue there was a special Clerdict, viz. That Edm Hudson was leized to him and the heirs males of his body, the remainder to William Hudson his Brother, and the heirs males of his body. That Edm. Hudson by Indenture betwirt himself and Thom. Peeps demised to Thom. Peeps from the feast of Sr. Michael then last past for fir months. rendzing a Depper-coan Rent: and that afterwards by another Indenture between himself on the one part, and Thom. Peeps & Edw. Bromley on the other part, reciting the faid Leafe, he bargained and fold the Reversion to Tho. Peeps his heirs and affigns, to the intent to make him Tenant to the Pracipe in order to the luffering of a Common Recovery, in which Edm Bromley was to be the Recoveroz, and himfelf the faid Edw. Hudson the Mouchee, and that this Recovery was to be to the use of Edm Hudson and his heirs, ec. and the Jury made a special conclusion, viz. That if the Court should adjudge that

in this Recovery there were a good Tenant to the Præcipe, then they found for the Plaintiff; if otherwise, for the Defendant.

Serjeant Waller argued, that there was no good Tenant to the Precipe: for that Tho. Peeps never was in possession by vertue of the Leafe for fix months. Do Entry is found, nor no confideration to raise an use. All the confideration mentioned is the refervation of a Pepper-cozn; which is not lufficient: for it is to be paid out of the profits of the Land. De compared it to Colyer's case 6 Rep. where a sum in gross appointed to be paid by the Devicee, gave him an Estate in Feesimple: but a sum to be paid out of the profits of the Land, not. De cited the Lord Pagett's case, Moor. 343. Dyer 10. placito 31. Besides, the consideration in our case is a thing of no value: being but a fingle Pepper-coin. If an Infant make a Leafe for years, rending Rent, the Leafe is but voidable; but if an Infant make a Leafe for years, rendging a Rose, or a Pepper-corn, or any such like trifle, the Lease is void. De cited Fitzherb. tit. Entry congeable 26.

North. When a Tenant for life or years assigns his Estate, there needs no consideration, in such case the tenure and attendance, and the being subject to the ancient forseiture, and the payment of Rent, if there were any, is sufficient to best the use in the Assignee: but otherwise in case of a fee-simple. When a man is seised in fee, and makes a Lease for years, unless he give possession, and that the Lesse enter, he must raise an Asse. But in our case the reservation seems not sufficient to raise an Asse, for an Asse must be raised, and the Land

united to it, befoze a Rent can refult out of it.

Wyndham. It being in the case of a common Recovery, we must support it, if it be possible. In Succon's Hospital's case, 10 Rep. 34. a. it is said that the reservation of 12 d. Rent was a sufficient consideration to vest an Ale in the Pospital: and a Rent of 12 d. is as inconsiderable a matter in consideration of a great Estate, as a Pepper-coan in our case. The case in Dyer, that has been cited, is made a Quære in the book. I think the reservation of a Rent would have changed an Ale at the Common Law, and will raise an Ale at this day; If a Feosse to an Ale had made a Feossment in Fee rending Rent, the seossment (I conceive) would have been to the use of the second feosse, and the sirst Ale destroyed. The other two Justices delivered no Opinion.

At another day, the cause being moved again, North said, he had looked upon the President quoted out of Sutton's Hospitals case; and that there the reservation of a Rent was mentioned in the Deed as a consideration to raise an Ale, which, he said, would perchance make a disserence betwirt that case and this. But the Court would advise surther.

Bassett & Bassett.

M Action of Debt upon an Obligation of 600 l. penalty; the Condition was, That if the above-bounden John Bassett, his Heirs or Assigns, shall within fix months after the death of Mary Bassett his Mother, settle upon and assure unto Hopton Bassett, as the Council of the said Hopton Bassett, learned in the Law shall advise, at the Costs and charges of the faid Hopton Bassett, an Annuity or Rent-charge of twenty pounds per annum, payable half-yearly by equal portions, from the death of the faid Mary, during Hopton Baffett's life, if he the faid Hopton Baffett require the same at the dwelling house of the said John Bassett; or, if he shall not grant the fame, if then the faid John Baffett shall pay unto Hopton Baffett, within the time aforementioned, 300 l. then the Obligation to be void. The Defendant pleaded, that the Plaintiff (to wit, the faid Hopton Bassett) had not tended any Grant of an Annuity, within the time of fix months after the beath of his Dother, according to, ec. the Plaintiff replyed, and the Defendant rejoyned; But the Council of both fives and the Court agreed, that the whole question arose upon the plea

Strode for the Defendant. The Plaintiff ought to have tended us a grant of Annuity, to be fealed within fix months, etc. and having neglected that, he has dispensed with the whole Condition. For 1. This is not a disjunctive Condition, but the payment of 300 l. is as a penalty imposed upon him, if he refuse to make such a Grant. And if he shall not, &c. instead of the word not, put the words refuse to, &c. and the case will be out of doubt. Besides, the annuity to be granted, is but 20 l. per annum for a life, and 300 l. in money is more

moze then the value of it, so that it cannot be intended a sum to be paid in lieu of recompence of it; but must be taken for

a penalty.

But suppose it to be a disjunctive Condition, then we ought to have an Election whether we would do; but as this case is, the Plaintiff by his negligence has deprived us of our Election. for Authorities he cited Gerningham & Ewer's case, Cr. Eliz. 396. & 539. 4 H. 7. fol. 4. 5 Co. 21. b. Laughter's cafe. & Warner & Whyte's case, resolved the day before in the Kings There is a rule laid down in Morecomb's case, in Moors Reports, 645. which makes against me: but the resolution of that case is Law; and there needed no such rule. That case goes upon the reason of Lambs case, 5 Rep. when a man is obliged to pay such a sum as J. S. shall affels, J. S. being a meer Aranger, the Obligor takes upon him, that J.S. shall assess a sum in certain; and he must procure him to do it, or be forfeits his Obligation. But in our cafe nothing is to be done but by the Obligee himfelf.

Pemberton contra. He argued that the Obligous Election is not taken away; for though no Deed were tendred him, he might have got one made, and the tender of that would have discharged the Condition of his Bond. Indeed this will put him to charge, but he may have an Axion of Debt for what he lays out. He cited the cases cited by Walmelley in Moor 645. betwirt Milles & Wood: 41 Eliz. & Gowers case 38 & 39 Eliz. &c.

North. The case of Warner & White, adjudged pesterday in the Court of Kings Bench, is according to Law; the condition there was, that J. S. should pay such a sum upon the 25th of December, og hould appear in Hillary Term after, in the Court of Kings Bench. J.S. died after the 25th day of Dec', and before Hill. Term; and had paid nothing upon the 25th of In that case the Condition was not broken by the non-payment, and the other part is become impossible by But I think, that if the first part of a Conthe act of God. dition be rendzed impossible by the act of Sod, that the Obligoz is bound to perform the other part: But in the case at the bar the Obligors Election is taken away by the act of the Obligce himself. And I see no difference betwirt this case and that of Gerningham & Ewer, in Cr. Eliz. if the Condition of an Obligation be fingle, to make fuch affurance as shall be advised by the Council of the Obligee; there concilium non dedit advisamentum, is a good plea; and the Obligoz is not bound to

make an affurance of his own head; no moze thall he be bound to do it when the Condition is in the disjunctive, to save his Bond. In both cases the Condition refers to the manner of the affurance; and it must be made in such manner as the words of the Condition import. So he said he was of Opf-

nion against the Plaintiff.

Wyndham. Alhere the Condition of an Obligation is in the disjunctive, the Obligoz must have his Election. But in this case there is no such thing as a disjunctive, till such time as there be a request made to seal a Deed of Annuity; and then the Obligoz will have an Election, either to execute the assurance, ozto pay the 300 l. but no such request being made, it should seem that the Obligoz must pay the 300 l. at his peril.

Atkyns agreed with the Chief Justice, and so did Scroggs: wherefore Judgment was ordered to be entred against the

Plaintiff. Nisi causa, &c. within a week.

Quare impedit, The Plaintist veclared upon a grant of the Advowson to his Ancesto; and in his Declaration says, his in Curprolat, but indeed had not the Deed to shew. Serjeant Baldwin brought an Assidavit into Court, that the Defendant had gotten the Deed into his bands, and prayed that the Plaintist may take advantage of a Copy thereof, which appear'd in

an Inquitition found temp. Edw. 6.

Cuf. When an action of Debt is brought upon a Bond to perform Covenants in a Deed, and the Defendant cannot plead Covenants perform'd, without the Deed, because the Plaintist has the original deed, and perhaps the Defendant took not a Counterpart of it; we use to grant imparlances till the Plaintist bring in the deed. And upon Evidence, if it be proved that the other party has the deed, we admit Copies to be given in Evidence. But here the Law requires that the deed be produced; you have your remedy for the deed at Law. We cannot alter the Law, nor ought to grant an emparlance,

Stead & Perryer.

L has likewise a Son called Robert. The Grandsather deviseth the Land in question to his Son Robert, and his heirs. Robert the devised dies in the devisors life time. Afterwards the devisor makes a new publication of the same Will; and declares it to be his intention that Robert the Grandschild should take the Land in question per eandem voluntatem, instead of his Father, and dyed. And all this was sound by special Aerdict upon a Trial betwirt Robert the Grandschild, and a Daughter of the elder Brother of Robert the sirst devisee.

Pemberton. The Land does not pass by this Mill; the devise to Robert became void by his death, and cannot be made good by a republication. A publication cannot alter the words of a Mill so as to put a new sense upon them. Land must pass by Will in writing. Robert the Grand-son, is not within this Will in writing. The Grandsathers intention is not considerable in the case.

Skipwith contra. I agree the case between Brett & Rygden in the Commentaries, to be Law: but there are two great diversities between this case and that. I. There was no new publication. 2. In this case Robert the Father, and Robert the Son are cognominous. De cited Dyer 142, 143. Trevilians case. Fuller & Fuller. Cr. Eliz. 422. & Moor 353. Cr Eliz. 493.

North & Atkyns. Without question Robert the Grand-child shall take by this Will. If he never had had a Son called Robert, or is Robert the Son had been dead at the time of making the Will, the Grand-child would then without dispute have taken by these words. Row a new publication is equivolent to a new writing. The Grand-child is not directly within the words of the Will; but they are applicable to him. He is a Son, though he be not begotten by the body of the devilor himself. He is a Son with a distinction. Dur Sabiour is called the Son of David, though there were 28 Generations betwirt David and him. And a republication may impose another sense upon words, distinction from what they had, when they were first written; as, if a man devise all his

Lands in Dale, and have but two Acres in Dale; the words now extend to no more then those two Acres: and if he purchase more, and die without any new publication, the new purchased Lands will not pass. But if there were a new publication after the purchase, they would then pass well enough. If a man has issue two Sons called Thomas; and he makes a devise to his Son Thomas, this may be ascertained by an averment. Row suppose that Thomas the devised die living the Father, and afterward the Father publisheth his Will anew, and says that he did intend that his Son Thomas now dead, should have had his Land; but now his Will and intent is, that Thomas his younger Son now living shall take his Land by the same Will. In this case, to be sure the second Son Thomas shall take by the devise. Here the import of the words is clearly altered by the republication.

Atkyns. The words of this Will would not of themselves be sufficient to carry the Land to the Grand-child, nor would the intention of the Devilor do it without them: but both together do the business. Que non prosunt singula, juncta

iuvant.

Wyndham & Scroggs differed in Opinion, and the cause was adjourned to be argued the next Term.

North A man admitted in forma pauperists not to have a new Trial granted him: for he has had the benefit of the kings Justice once, and must acquiesce in it. We do not suffer them to remove causes out of insertour Courts. They must satisfie themselves with the Jurisdiction within which their action properly lieth.

Farrington & Lee.

A Slumplit. The Plaintist declares upon 2 indebitatus Affumplits, and a third Assumplit upon an infimul computailet. The Defendant pleaded non Assumplit infra sex annos: the Plaintist replied, that himself is a Herchant, and
the Defendant his factoz, and recites a clause in the Statute, in which Actions of Account between Herchants and
Perchants, and Perchants and their Factozs, concerning
their

their Trade and Perchandize, are excepted; and avers that this money became due to the Plaintiff upon an account betwirt him and the Defendant concerning Perchandile, ec. the Defendant makes an impertinent rejoynder, to which the Plaintiff demurs.

Nudigate pro Querente. This Statute is in the nature of a penal Law; because it restrains the liberty which the Plaintiff has by the Common Law, to bying his Action when he will: and must therefore be construed beneficially for the Plaintiff: Pl. 54. Cr. Car. 294. Finche & Lambe's case: to this purpose. Also this exception of Accounts between Werchants and their factors, must be libecally expounded for their benefit; because the Law-ma-kers, in making such an exception, had an eye to the incouragement of Trade and Commerce. The words of the exception are (other then such Accounts as concern the Trade of Merchandise, &c.) now this Action of ours is not indeed an Action of Account; but it is an Action grounded upon an Account. And the Plaintiff being at liberty to bying either the one of the other upon the same cause of Action, and one of the Actions being excepted express out of the limitation of the Statute, the other by Equity is excepted also. De cited Hill. 17 Car. 1. in Marshe's Reports, 151. & Jones 401. Sandys & Blodwell: Mich. 13 Car. 1. and prayed Judgment for the Plaintiff.

Serjeant Baldwin contra. De said it did not appear in the Declaration, that this Action was betwirt a Perchant and his Facoz; so that then the plea in bat is prima facie good. And when he comes and sets it forth in his Replication, he is too late in it: and the replication is not pursuant to his Declaration.

But all the Court was against him in this. Then he faid the Statute excepted Actions of Account only; and not Actions upon an indeb. Assumpsit.

Cur'. Alhereas it has been said by Serjeant Nudigate, that the Plaintiss here has an Election to bying an Action of account, or an Indebitat. Assumption, that is saile: for till the Account be stated betwirt them, an Action of Account lies, and not an Action upon the Case. Alhen the Account is once stated, then an Action upon the case

lies, and not an Action of Account. Et per North, if upon an Indebitat. Assumpsit matters are offered in evidence, that lie in account, I do not allow them to be given in evidence.

North, Wyndham & Scroggs: the exception of the Statute goes only to Actions of Account, and not to other Actions. And we take a divertity betwirt an account current, and an account stated. After the account stated, the certainty of the Debt appears, and all the intricacy of account is out of doors: and the Action must be brought within six years after the account stated. But by North, if after an account stated, upon the ballance of it a sum appear due to either of the parties, which sum is not paid, but is afterward thrown into a new account between the same parties, it is now sip't out of the Statute again.

Scroggs. The Statute makes a difference betwirt Adions upon Account, and Actions upon the case. The words would else have been, All Actions of Account, and upon the Case, other then such Actions as concern the Trade of Merchandise. But it is otherwise penned; other then such Accounts as concern, &c. and as this case is, there is no account betwirt the parties; the account is determined, and the Plaintiff put to his Action upon an insimul computaliet: which is not within the benefit of the exception.

Atkyns. I think the makers of this Statute had a greater regard to the persons of Perchants, then the causes of Acion between them. And the reason was, because they are often out of the Reason, and cannot always prosecute their Acions in due time. The Statute makes no difference betwirt an account current, and an account stated. I think also that no other soft of Tradesmen, but Perchants are within the benefit of this exception: and that it does not extend to Shop-kapers, they not being within the same mischief. Adjurnatur.

Horn versus Chandler.

ADvenant upon an Indenture of an Appzentice, wherein the Defendant bound himself to serve the Plaintiff for seven years. The Plaintiff sets forth the custom of London, That any person above 14, and under 21, unmarried, may bind himfelf Apprentice, &c. according to the custom, and that the Waster thereupon shall have tale remedium against him, as if he were 21, and alleages, that the Defendant did go away from his Service, per quod he lost his Service for the faid term, which term is not pet expired. The Defendant pleads a frivolous plea. To which the Plaintiff demuts. Heley. Though such a Covenant shall not bind an Infant, neither by Common Law, noz 5 Eliz. 1. Cr. 170. pet by this custom it shall, in Pasch. 21 Jac. B. R. Cole versus Holme, there was such an Action against an Apprentice, the Defendant pleaded Nonage; the Plaintiff replyed the cuffom of London, and that the Indenture of Apprentiship was inrolled, as it ought to be, ec. and this was certified by the Recorder, Serjeant Finch, to be the custom: and thereupon Judament was against the Defendant, it is a Manu-Ccript.

lones. The custom ought to have been alledged, that he thould have an Action of Covenant against him, which is not done here; and customs shall be taken strictly, not by impli-Mozeover the Plaintiff Declares for a loss not yet

fuffained, the term not being ended.

Cur. The custom is sufficiently alledged to give and make Tale remedium implies it. good an Acion of Covenant. Those words are applicable to all things relating to this matter, viz. That the Pafter may correct him, may go to a Justice of Peace. And also may have an Action of Covenant against him, as against a man of full age. And though by v. Hutt. 63.4. Common Law of the Statute, his Covenant thall not bind Winch. 63. 4 him, pet by the custom it thall. But Twisden delired to see Offley's Report. As to the declaring for the lols of the term, part whereof is unexpired, though it has been adjudged to be naught after a Aerdick; yet in this Cafe, which is upon demurrer, it may be helped ; Foz the Plaintiff may take dam.

ageg

ages for the departure only, not the loss of service during the term, and then it will be well enough. Judgment nisi, &c.

Jones versus Powel.

Declaration per quod, &c. Cur. The words are actionable, though there had been no special damages; for they speak him to be ignorant in his Profession, and we shall not intend that he had a distemper in his eyes, &c. Judic. pro querente.

Anonymus.

The Defendant, in an Action of falle Impilonment, justified the taking and impiloning the Plaintiss, by bertue of an Diver of Chancery, that he should be committed to the Fleet; and the Plea judged naught, because an Diver is not sussicient. It ought to have been an Attachment, he should have pleaded, Quoddam breve de attachamento,&c.

Osborne versus Walleeden.

Replevin. The Defendant about in right of his Wife, for a Rent-charge, deviced to her for life, by her former dusband. But in the Will there was this Clause, viz. If she shall marry, &c. he (the Executor) shall pay her 100 l. and the rent shall cease, and return to the Executor. She doth marry, and the Executor does not pay the 100 l. The question was, Whether the rent should cease before the 100 l. be paid.

Jones

Jones for the Plaintiff: the rent cealeth immediately upon her Parriage, and the thall have remedy for the 100 l. in the Spiritual Court. If the words had been, He thall pay her 100 l. and from that time the rent shall cease, It had been otherwise; if the had died presently after the marriage, her Erecutor should have had the 100 l.

Brewer and Sanders for the Defendant, the hath not a prefent interest in the 100 l. In this very Case, the Common Pleas delivered their Opinion, That this 100 l. ought to be paid before the rent should cease. But for imperfection in the

pleading, we could not have Judgment there.

Roll. She has no present interest in the 100 l. nor can her Executors have any, and the rent thall not cease till the payment of it. For first, It is devised to her for life, not during her Misowhood. Secondly, The rent issues out of the Inheritance, and by the construction of the Mill it shall go to the Executor, for by cease in the Mill is meant cease as to the Mise; and the Executor is in nature of Purchasor, and ought to pay the money before he has the rent, and he ought to pay it out of his own Estate, if he will have the rent. For otherwise, if it be lookt upon as a Legacy, if he have no Assets, the shall be immediately stript of her rent, and have nothing.

Twisden. I think the Divisors meaning was to give her a present interest in the 100 l. and if so, the rent must cease presently upon the marriage. But since it is to be issuing out of the Inheritance, it is doubtful. And since my Brothers are both of Opinion for the Avowant, let him have Judg-

ment.

Then it was Objected, That the Abowy was ill; Koz it ought to have been in the Wifes name as well as the Oulbands, and alledged, that Roll. 1 part 318. N. num. 2. makes a Quære, and sæms to be of opinion that Wife versus Bellent (which is to the contrary) is not Law. V. 2 Cr. 442. 3.

Twisd. That was his Opinion, it may be, when he was a Student. You have in that Work of his a common place, which you kand too much upon. I value him where he reports Judgments and Resolutions. But otherwise it is nothing but a Collection of Pear-Books, and little things noted when he made his Common Place Books. Dis private opinion must not warrant or controul us here. It has ben adjudged, That the Pusband alone may avow in right of his Wife.

Dn n

Delaval

Delaval versus Maschall.

if J. S. and J. D. Arbitrators bid make an Award on, or before the 19. of February; and if the Defendant should perform it, then the Obligation should be void, and then follow these words, And if they do not make an Award before the 19. of February, then I impower them to choose an Umpire, and by these Presents bind my self to perform his Award. The Defendant pleads, That they did not make an Award. The Plaintist replies, and sets south an Award made upon the said 19. of February, by an Ampire chosen by the Arbitrators, and alledges a breach thereof. The Desendant demurs.

Sanders for the Defendant. Here is no breach of the Condition of the Bond. For that, which relates to the performing the Ampires Award, it following those words. Then the Obligation shall be void, is no part of the Condition; and if any Action is to be brought upon that part, it ought to be Covenant. 2. The Award made by the Ampire is void, because made the 19. of February, which was within the time limited to the Arbitrators, for their power, and the Ampire could not make an award within that time, because their power was not then determined, as was lately adjudged in Copping versus Hornar.

Jones for the Plaintiff. The Condition is good as to this part, It is all but one Condition. A man may make several Deseasances or Conditions to deseat the same Obligation, Brook. Condition 66. There is a continuance of this Condition, It is said, I bind my self by these presents, which refers

to the Lien before in the Obligation.

Jagreed with Copping versus Hornar and Bernard versus King, That where an Ampire is at first certainly named and appointed, he cannot exercise his authority within the time appointed to the Arbitrators, because the same authority cannot be given to, and continue both in the Arbitrators and Ampire at the same time. But when the Ampire is named and chosen by the Arbitrators, as in our Case, he may make his award within the time allowed to the Arbitrators; be-

caule

cause there the Arbitrators by their own action, viz. the election of the Ampire, determine their authority; And the authority vests and remains in the Ampire only, and so it

was admitted in Bernard versus King.

Twisden, assentibus Rainsford & Morton. This is a good part of the Condition. There was a Condition, That if the Obligor should, &c. then the Bond should be void; and further, that the Obligor should release: And it was adjudged here, That the last was a part of the Condition. I was at the Bar when the Cafe betwirt Barnard and King was spoken to, and I know Roll did hold and deliver then, That if it had been alledged, that the Arbitrators had wholly denied and deserted their power, it had let in the Ampire, so as that he might account within the time allowed to the Arbitrators, and he flood upon this then, that it was implicitely alledged, viz. Postquam denegassent, &c. But this was a hard Opinion of his, and he himself reports his own judgment otherwife, 1 Ro. 262. It may be he altered his Opinion, we inclin'd that the award in the Case at the Bar is naught. For the authority of the Arbitrators was not determined till after the 19th of February. For Justice Croke goes to far, 1 Cr. 263. as to agree, That Arbitrators may nominate an Ampire within the time for their making their award. So that the chusing the Ampire both not extinguish their authority, and therefore the Ampire could not make an award upon this 19th of February. It is true the Arbitrators might chuse him upon that day, or before. But, yet Mill they might have made an award, and therefore he could not. Adjournatur.

Rex versus Episcopum Worcest', Jervason & Hinkley in Communi Banco.

See the Case put at large in Vaughan's Reports.

The Arguments of Justice Wild, Archer and Tyrrel, were as follow. The Chief Justices Argument is here omitted, because published at large in his own Reports.

Ustice Wild. I think the King cannot take the traverse in this Cafe, and this will appear by looking upon the old Books, which were not well confidered by those who did reply, 13 H. 7. 13. 14. Pl. 18. It is faid the King may chule, either to maintain his own Title, of traverle the Title of the party, who fues him by Petition. So 13 E. 4. 8. pl. 1. It is faid when one traverles an Office, the King may either maintain the Office, or traverse the Title thewn for the party, because no man shall recover Lands against the King without having a Citle. But there it is Resolved, That if the King joyn iffue upon his own Title, he cannot change iffue, and traverse the Title shewed for the party; Now here is the allegation of the King, that the Advowson was in gross, and the Defendants denying it, is in nature of joyning an iffue, which cannot be receded from. But the reason why in that Case the King might wave the traverse tendered to his Title, and traverse the Title shewn for the party, is, because the Office puts the King in actual possession; for where the King is in by Record, or possession (for possession is enough) the party must make a Title, if he will recover against the King, Keil. 192.pl.3. Savages Cafe. It was found by Inquilition, that whereas the Turn time out of mind used to be held at Worcester, he being Sherist for life, held it at Pedyl and Streight, Contra formam Statuti de magna Charta, upon a Scire fac. upon an Information hereupon, for forfeiting the Office, he pleads that time out mind, ac. it used to be held

at Pedyl, &c. absq; hoc that it used to be held at Watester: Resolved, That the King might maintain the Inquisition, that it used to be held at Worcester absque hoc, that it used to be held at Pedyl,&c. and the reason is, because the King was intituled to the Forfeiture by a Record. The difference is, where the King is Acoz, as here he is, being out of possession, he must make a Citle, and probe it. But where the party is Actor he cannot fix upon his own Title, and force the Iting to make good his own Title, 34 H. 8. Br. Prerog. 116. Whorewood's Case is full in point. In an Information tam quam, if the Defendant traverse, the King cannot wave the iffue so tendered. One Reason indeed given is, because the King is not fole party. But the chief reason is, because the King is not intituled by matter of Record : for faith the Book, There is no Office found before the Information. But upon a traverse of an Office, & hujusmodi, saith the Book, the King may do it, because he is intituled by matter of Record; therefore in our Cale the King Hall not wave the issue tendered, ec. and fly upon the matter of the Defendants Citle.

Archer accordant. It must be admitted, that in this Case the king must make a Title, because by presenting of Tim. White and also of Hinkley the Defendant, the which was nine years since, he is put to his Quare Impedit, and is out of possession, I do not say of the Inheritance, though that hath been a question in the old Books, V. 2 Cr. 53. But it has been adjudged, That the Inheritance cannot be gained or devested out of the king by any Usurpations, 2 Cr. 123. 3 Cr. 241. & 519. and Green's, 6 Co. 30. a. But that he may grant away the Inheritance of the Advowsons still, &c. But it is as clear, and agreed by all those Books, and Boswell's Case, 6 Co. 49, 50. that in such case, he must bring a Quare Impedit to recover the Presentation, so he is put out of possession of that. For as my Lord Hob. 322. observes, it is one of the things, whereupon Asurpation works more bis-

lently than upon other possessions.

Now he that is thus out of possession, and put to his Quare Impedit, must always make a Title to himself in the Declaration, Hob. 102. and this the Defendant cannot counterplead, but by conveighing a Title to himself, and so avoiding the Plaintiss alledged Title, by traverse, or confessing and avoiding, Hob 163. Now here the Desendant hath done what he could do; he hath traversed the Kings Title, why then

shall thing depart from his own Citle, and sly upon the defected title of the Defendant? No. Actori incumbit onus; he must recover by his own strength, not by the Desendants weakness. The Desendant, by traderling the kings Title, has closed up the king, so as that he ought to take issue, and maintain his own Title. V. 2 Cr. 651. I say therefore, That the kings declining his own Title, and falling upon the others, is a departure, which is matter of substance, and it would make pleading infinite, therefore the demurrer in this Tale is good, I Cr. 105. is in point; and so is Hobart's Opinion in Digby versus Fitzherbert, 103. 104. and though the Judges are two and two in that Tale, as it is there reported, pet the whole Court agreed it afterwards.

So that, were this a common persons Case, I suppose it would be agreed on all hands. But it is insisted, that this is one of the Kings Prerogatives, that when his Title is traversed by the party, he may either maintain his own Title against the traverse of the party, or traverse the affirmative

of the party, Pasch. pr. C. 243. a. &c.

Answer. It is true, this is there reckoned up among many other Prerogatives of the King. But, first, with reverence, several of them are judged no Law, as that if the King have Title by Laple, and he luffer another to present an Incumbent, who dies, the King thall yet present, is counterjudged, 3 Cr. 44. and both that and the next following point too, 7 Co. 28. a. Secondly, In the same Case, fol. 236. there is a good Rule given, which we may make use of in our Case, viz. the Common Law doth so admeasure the Kings Citle and Prerogatives, as that they thall not take away, noz pzejudice any mans Inheritance. V. 19 E. 4. 9. 11 H. 4. 37. 13 E. 4. 8. 28 H. 6. 2. 9 H. 4. 6. F. N. B. 152. Now my Brother Wild hath given the true Answer, that when the Kings Title appears to the Court upon Record, that Record so intitles the King, that by his Prerogative he map either defend his own, of fall upon the other's Title. For in all Cases where the King either by traverse, as 24 E. 3. 30. pl. 27. Keil. 172. 192. og otherwife, as by special demurrer, E. 3. Fitz. monst. de Faits 172. falls upon a Defendants Title, It must be understood, that the King is intitled by Record, and sometimes it is remembred, and mentioned in the Case, Fitz. 34. That the King is in as by Office, ec. But Br. Preg. 116. the Kings Attorney both confess the Law to

be so expresly, that the King has not this Precognitive, but

where he is entitled by matter of Record.

Before 21 Jac. cap. 2. when the Kings Titles was found by any Inquilition, or Prefentment by virtue of Commissions to find out concealments, defective Titles, ec. he exercised this Prerogative of falling upon, and traverting the parties Titles, and much to the prejudice of the Subjects, whose Titles are often to ancient and obscure, as they could not well be made out. Row that Statute was made to cure this defeat, and took away the severity of that Prerogative; Devaining, that the King hould not fue, or impeach any person for his Lands, ec. unless the Kings Titles had been duly in charge to that King of Queen Eliz. of had flood insuper of Record within 30 years before the beginning of that Parliament, ac. Hob. 118. 9. the King takes Islue upon the Defendants Traverse of his Title, and could the King do otherwise, the mischief would be very great, as my Brother observed, both to the Patron and Incumbent. The Law takes notice of this, and had a jealouse, that falle Titles would be fet on foot for the Iting: and therefore 25 Edw. 3. St. 3. Car. 7. & 13 R.2. Car. 1. & 4 H. 4. Ca. 22. enables the Didinary and Incumbent to counterplead the Kings Title, and to defend, fue, and recover against it. But a fortiori at Common Law the Patron, who by his Endowment had this Inheritance, might controvert, and Traverse the Kings Title; and it is unreafonable and mischievous, that the Crowns possessions by Laple, oz, it may be, the meer suggesting a Title for the king, should put the Patron to thew, and maintain his Citle, when perhaps his Title is very long, confisting of 20 mesne Conveyances; and the King may Traverse any one of them: Keilway 192. b. Pl. 3. I conclude, I think the King ought to have taken Iffue, and he not doing it, the Demurrer is good: and that the Defendant ought to have Judgment.

Tyrrell contra. I am not satisfied but here is a Discontinuance. For the Defendant pleads the Appendency of the Church only, not the Chappel. It is true, he traverseth, that the Queen was not seized of both.

I very what is affirmed, that the King by his Presentation of Timothy White, and the present Incumbent, is out of possession. By the Judgment of reversal, 2 Cr. 123. 4. the Law at this day is, that he cannot be put out of possession bowson

bowson by 20 usurpations. A Quare Impedit is an Action of Possession; and if he were out of possession, how could he bring it? As to this Traverle, It is a common Erudition, that a party thall not depart, and that there thall not be a Traverse upon a Traverse. But the King is excepted: 5 Co. 104. Pl. C. 243. a. Br. Petition 22. Prerogatives 59, 60, 69. & 116. It is agreed, where the King is in possession, and where he is intitled by matter of Record, he may take a Traverse upon a Traverse. And there is no Book says, that where he is in by matter of fact, he cannot do it. Indeed there is some kind of pregnancy at least in the last of those Authorities. But I will cite two cases, on which I will rely: viz. 19 E. 3. Fitz monstr. de faits, 172. which is our case. The King in a Quare Impedit makes Title by reason of Awardhip, whereby he had the custody of the Mannoz, to which the Advowson belonged, and that the father dred feifed thereof, &c. and there is not a word that his Tytle was by matter of Record. The Defendant pleads, that the Father of a Ward made a feofiment of the Mannoz to him for life, and afterwards released all his right, ac. so that the Father had nothing therein at the time of his death, and that after his death, he the Defendant enfeoffed two men, ec. and took back an Effate to himself for 10 years, which term pet continues, and fo it belongs to him to prefent. But he did not thew the release, but demurred in Judament upon this, that he ought not to thew the release; and the Kina departs from his Count, and infiffs upon that which the Defendant had confessed, that he had made a feofimet, which he habing not thewn by the release, as he ought to make himself more then Tenant for life, was a Forfeiture, and therefore the heir had cause to enter, and the King in his right, and thereupon prays Judgment; and has a Writ to the Bishop. Cook 86. 7. 1 Inft. 304. b. The other case is 24 Ed. 3. 30. Pl. 27. which is our very case. The King brings a Quare Impedit for a Thurch appendant to a Mannoz, as a Guardian, the Defendant makes a Title, and traverseth the Title alledged by the King in his Count, viz. the appendancy, the King replies, and Traverles the Defendants Title. For this cause the Defendant demurs, and Judgment was for the King. case it both not appear in the pleading, that the King was in by matter of Record, and to it is our very cafe. For the King may be in by possession by virtue of a Wardship, without matter of Becom by Entry, et. Stamf. Prerog. 54. 3 rely up. on these two Cases. But 7 H. 8. Keil. 175. is somewhat to the purpose; Per Fitz. In a Ravishment of Mard by the King, if the Defendant make a Title, and traverse the Kings Title, the Kings Attorney may maintain the Kings Title, and Traverse the Defendants Title. I think there is no difference between the Kings being in possession by matter of Re-

cozo, and by matter of fact.

Again, If matter of Record be necessary, here is enough; viz. The Queens Presentation under the Great Seal of England. And here is a descent, which is and must be Jure Corone. It is unreasonable, that a Subject should turn the King out of possession by him that hath no Title. This is a Prerog. Take. As to the Statutes objected by my Brother Archer, they concern not this case. The first enables the Patron to counterplead. But, here the Patron pleads.

The rest concern the Kings Presenting En auter droit. But here it is in his own Right. I think the King in our case may sty upon the Defendants Title, and there is no inconvenience in it. For the Kings Title is not a bare suggestion. For, it is confessed by the Desendant, that the Duken did Present: But, he alledges it was by Laple.

For another reason, I think Judgment ought to be for the King, viz. because the Defendant has committed the kinst sault. For his Bar is naught, in that he has traversed the Queens Seisin in Grosse; whereas he ought to have traversed the Queens Presentment modo & forma. For where the Citle is by a Seisin in Grosse, it is repugnant to admit the Presentment, and deny the Seisin in Grosse; because the Presentment makes it a Seisin in Grosse. 10 H. 7. 27. Pl. 7. in point, and so is my Lord Buckhurst's Case in 1 Leonard 154. The traverse here is a matter of substance. But if it be but Form, it is all one. For the King is not within the Statute 27 El. cap. 5. So he concluded that Judgment ought to be given sor the King.

Doctor Lee's Cafe.

A Motion was made by Raymond for a White of Priviledge, to be discharged from the Office of Expenditour, to which he was elected and appointed by the Commissioners of Sewers, in some part of Kent, in respect of some Lands
he had within the Levell. De insisted that the Doctor was an
Ecclesiastical person, Archdeacon of Rochester, where his constant attendance is required. Adding, that the Office, to
which he was appointed, was but a mean Office, being in the
nature of that of a Baylish, to receive and pay some small
sums of money, and that the Lands, in respect whereof he
is elected, were let to a Tenant, V. 1. Cr. 585. Abdy's case.

It was objected against this, that this Archdeacons Predecessor bid execute this Office: and the Court ordered, that notice should be given, and cause shown why the Doctor should

not bo the like.

Afterward Rainesford & Morton only being in Court, it was ruled he should be priviledged. Because he is a Clergy-man, F.B. 175. r. But I think for another reason, viz. because the Land is in Lease, and the Tenant, if any, ought to do the Office.

Take the Wirit.

Lucy Lutterell, vid. versus George Reynell, Esq;, George Turbervile Esq;, John Cory & Ann Cory.

The Plaintiff as Administratrix to Jane Lutterell, durante minori state of Alexander Lutterell, the Plaintiffs second Son, declared against the Defendants, in an Action of Trespass, so that they simul cum John Chappell, &c. did take away 4000 l. of the moneys number of the said Jane, upon the 20th day of October, 1680. and so so seven days following the like sums, ad damnum of 32000 l.

Apon

Apon a full hearing of Witnesses on both sides, the Jury found two of the Defendants guilty, and gave 6000 l. damages, and the others not guilty.

A new Trial was afterwards moved foz, and benied.

At the Trial Pr. Attorney General excepted against the Evidence, that if it were true, it destroyed the Plaintiss Action, inasmuch as it amounted to prove the Defendants guilty of felony; and that the Law will not suster a man to smooth a felony, and bring Trespals for that which is a kind of Robbery. Indeed, said he, if they had been acquitted or found guilty of the felony, the Action would lyz; and therefore it may be maintained against Mrs. Cory, who was, as likewise was William Maynard acquitted upon an Indiament of felony for this matter, but not against the rest. But my Lord Chief Baron declared, and it was agreed, that it should not lye in the mouth of the party, to say that himself was a Thief, and therefore not guilty of the Trespals. But, perhaps if it had appeared upon the Declaration, the Defendant ought to have been discharged of the Trespals.

Quære, what the Law would be, if it appeared upon the

pleading, or were found by special Clerdia.

My Lozd Ch. Baron did also declare, and it was agreed, that whereas W. Maynard, one of the Alitnesses for the Plaintiss, was guilty, as appeared by his own Evidence, together with the Defendants, but was left out of the Declaration, that he might be a Mitness for the Plaintiss, that he was a good and legal Alitness; but his credit was lessened by it, for that he sware in his own discharge. For that when these Desendants should be condicted, and have satisfied the Condemnation, he might plead the same in Bar of an Action brought against himself. But those in the simul cum were no Mitnesses.

Seberal witnesses were received and allowed, to prove that William Maynard bid at several times discourse and declare the same things, and to the tike purpose, that he testified now. And my Lord Chief Baron said, though a hear-say was not to be allowed as a direct Evidence, yet it might be made use of to this purpose, (viz.) to prove that William Maynard was constant to himself, whereby his Testimony was Corrobo-

rated.

One Thorne, formerly Mr. Reynell's Servant, being Subpoened by the Plaintiff to give Evidence at this trial, did not appear. But it being swoin by the Exeter Maggoner, that Thorne came to far on his Journey hitherward, as Blandford, and there fell to fick, that he was not able to travel any further, his Depositions in Chancery in a Suit there between these parties, about this matter, were admitted to be read.

Smith versus Smith.

A slumplit; The Plaintiff declared, whereas himself, and the Defendant were Executors of the last Mill and Testament of J. S. and whereas the Defendant had received so much of the money, which was the Testators, a moiety whereof belonged to the Plaintiff; and whereas the Plaintiff Pro recuperatione inde Sectastet the Desendant, that he the said Desendant, in consideration that the Plaintiff abstinered a Secta prædicta prosequenda & monstraret Quoddam computum did promise him 1001. and avers, that he did softear, &c. &

quod ostentavit quoddam Computum prædictum.

After a Clervick for the Plaintiff, it was moved in Arrest of Judgment, by Jones for the Defendant as followeth; Though I do not see how that which one Executor claims against another, is recoverable at all, unless in Equity; yet I shall instituted on this, that here is no good consideration alledged; for it is only alledged in general, that the Plaintist Sectasset. It is not said so much as that it was legal modo, in a legal way, whereas it ought to be set forth in what Court it was, ac, that so the Court might know, whether it were in a Court which had Jurisdiction therein or no; and so are all the Presidents in Actions concerning sorbearance to sue. In point of Evidence the sirst thing to be shewn in such a case as this, is, that there was a Suit, ac.

Saunders for the Plaintiff, That being the prime thing necessary to be proved, since the Aerdick is found forus, must be intended to have been proved. But, however, if this consideration be idle and void, yet the other maintains the Action; and so the Court agreed, viz. that one was enough. It was agreed, that if the Plaintist averred only that he had shewed Quoddam Computum, that unless the consideration had been to shew any account, it had been naught: for quoddam is aliud. Dy. 70. nu. 38, 39. 1 H. 7.9. but it being Quoddam com-

putum

putum prædict', it was well enough. Computum prædictum refers it to the particular account discoursed of between them.

It was agreed, that it had been best to have said Monstravit in the aberment, that it might agree with the allegation of the consideration. But yet the word oftentavir, though most commonly by a Metonimy, it signifies to boast, yet signifieth also to shew, or to shew often, as appears by all the Dictionaries: and therefore it is well enough. Take Judgment.

Sir Francis Duncombe's Cafe.

It was held, If a Afric of Erroz abate in Parliament, oz the like, and another Afric of Erroz be brought in the same Court, it is no Supersedeas. But if the first Afric of Erroz be in Cam Scace', &c. and then a Writ be brought in Parliament, &c. it is a Supersedeas by the Opinion of all the Judges, against my Lozd Cooke, vide Heydon versus Godsalve, 2 Cr. 342.

Browne versus London.

Indeb' Assumplit for fifty three pounds due to the Plaintist upon a Bill of Exchange drawn upon the Defendant, and accepted by him, according to the custom of the Derchants, ac. After a Clerdict for the Plaintist, it was moved in arrest of Judgment, that though an Action upon the Case does well lie in such case, upon the Derchants, yet an Indeb' Assumplit may not be brought thereupon.

Winnington. I think it both well lye. Debt lies against a Sherist upon levying and receiving of money upon an Erecution, Hob. 206. Now this is upon a Bill of Erchange accepted, and also upon the Defendants having estens of the drawer in his hands, having read the value; for so it must be intended, because otherwise this general Aerdia could not be found.

Rainef-

Rainesford. This is the very same with Milton's Case, lately in Scace', where it was adjudged, that an Indeb' Affumpfit would not live. In this case be added, that the Aerdia would not help it; for though my Lord Thief Baron faid it were well, if the Law were otherwife, yet he and we all agreed that a Bill of Exchange accepted, ec. was indeed a good ground for a special Action upon the case: but that it did not make a Debt; firff, because the acceptance is but conditional on both If the money be not received, it returns back upon the dawer of the Bill. De remains liable fill, and this is but collateral. Secondly, because the word Onerabilis both not imply Debt. Thirdly, Because the case is prima Impresfionis : there was no Prefident for it. Then Offley who was of Council pro Defendente in the case at bar said, that he was of Council for the Plaintiff in the Erchequer cafe, and that therein direction was given to fearch Presidents; and that they did fearch in this Court, and in Guildhall, and that there was a Certificate from the Attorneys and Prothonotaries there, that there was no President of such an Action. Adjor-

Twisden. I remember an Action upon the Case was brought, for that the Defendant had taken away his Goods, and hisden them in such secret places, that the Plaintist could not come at them to take them in Crecution; and adjudged it would not spe.

Watkins versus Edwards.

A Ction of Covenant brought by an Infant per Guardian' fuum, for that the Plaintist being bound Apprentice to the Defendant by Indenture, ec. the Defendant did not keep, maintain, educate, and teach him in his Crade of a Draper, as he ought; but turned him away. The Defendant pleads that he was a Citizen and Freeman of Bristol; and that at the General Sessions of the Peace there held, there was an Droer that he should be discharged of the Plaintist, for his disorderly living, and beating his Passer and Mistrels, and that this Droer was involled by the Clarke of the Peace,

Peace, as it ought to be, ac. To which the Plaintiff De-

It was said for the Plantiff, that the Statute 5 El. cap. 4. both not give the Justices, &c. any power to discharge a Dafter of his Apprentice, in case the fault be in the Apprentice, but only to minister due Correction and Punishment to him.

Cuf. That hath been over-ruled here. The Justices, ac. have the same power of discharging upon complaint of the Paster, as upon complaint of the Appentice. Else that Paster would be in a most ill case that were troubled with a bad Appentice: for he could by no means get rid of him. Secondly, it was urged on the Plaintists behalf, that he had not, for ought that appears, any notice or summons to come and make his defence. V. 11 Co.99. Baggs case: And this very Statute speaks of the appearance of the party, and the hearing the matter before the Justices, ac.

Saunders pro Defendente. In this case the Iustices are Iudges, and it being pleaded, that such a Judgment was given, that is enough, and it shall be intended all was

Twissen & Rainesford. That which we doubt is, whether the Defendant ought not to have gone to one Justice, &c. sirst, as the Statute directs, that he might take order and direction in it; and then, if he could not compound and agree it, he might have applyed himself to the Sessions. For the Statute intended there should be, if possible, a Composure in private; and the power of the Session is Conditional, viz. if the one Justice cannot end it. In Case of a Bassard Child they cannot go to the Sessions per Saltum; and we doubt they cannot in this Case. It is a new Case. And then the matter will be, whether this ought to be set down in the Pleading. Adjornatur.

Rex versus Ledginham.

Information fetting forth, that he was Lord of the Mannor of Ottery St. Mary in the County of Devonshire, wherein there were many Copyholders and Fresholders, and that he was a man of an unquiet mind, and did make unreasonable Distresses upon several of his Tenants, and so was communis oppressor & perturbator pacis. It was proved at the Crial, that he had distrained four Oxen for three pence, and six Cows for eight pence, being Amercements so, not doing Suits of Court, and that he was Communis oppressor & perturbator

pacis. The Defendant was found guilty.

It was moved in arrest of Judgment, that the Information is ill laid; first, It is said he disquieted his Cenants, and vered them with unreasonable distresses. It is true, that is a fault, but not punishable in this way. Foz by the Statute of Marlebridge; cap. 4. V. 2 In. 106, 7. he shall be punished by grievous Amercements, and where the Statute takes care foz due punishment, that method must be observed. 2. As to the matter it self, they do not set forth how much he did take, nor from whom; so that the Court cannot judge whether it is unreasonable or no, nor could we take Issue upon them. 3. As to the words Communis oppressor & perturbator pacis, they are so general, that no Indiatment will se upon them: 2 Ro. 79. Jones 302. Cornwalls Case; which indeed goeth to both the last points.

Twisden. Communis oppressor, &c. is not good, such general words will never make good an Indiament, save only in that known Case of a Barretoz, soz Communis Barrectator is a term which the Law takes notice of, and understands; It is as much, as I have heard Judges say, as a common knowe, which contains all knowery. Foz the other point, an Information will not lie soz taking outragious distresses. It is a private thing, soz the which the Statute gives a remedy, (viz.)

by an Action upon the Statute tam quam.

Cur. It is naught. Adjorn.

Roberts versus Marriot.

M Action of Debt brought upon a Bond to submit to an award. The Defendant pleads, Nullum fe-The Plaintiff replies, and fets forth an cerunt arbitrium. award made by two Debends of Westminster, and that it was delivered to the party, according to the condition of the Bond, &c. The Defendant rejoyns, that it was not delibeted, &c. Et hoc paratus est verificare. The Plaintiff demuts. Serjant Baldwynne and Winington pro defend. Jones pro querente. Cur. The Defendant having first pleaded, Nullum fecer' arb. and then in his Rejoynder that it was not delivered (which is a Confession that there was an award made) has committed a departure; and so it has been judged. If he had pleaded Nullum fec arbitrium, &c. absque hoc that it was tendered, ac. it had been naught: and it is as bad now. Also when the Plaintiff replies, that the award was delivered, and the Defendant faith, It was not, he should have concluded to the Country, and not as he doth, hoc paratus est verificare; for otherwise the party might go in infinitum; and there would be no end of pleading. Mote, there was an Exception taken to the award (viz.) that it was awarded that there should be a release of all Specialties among other things; whereas Specialties were not lubmitted.

Cur. Then the award is void as to that only. But indeed, if the breach had been assigned in not releasing the Specialties, it had been against the Plaintist. But now take Judgment.

Wood versus Davies.

Rov. & conv. de tribus struibus sæni, Anglice, Ricks of Hay. Doved in arrest of Judgment, that it was too uncertain. For no man could tell how much was meant by strues. It was urged it should have been so many Cart loads, or the like. For loads was adjudged uncertain in Glyn's 19 p

time here. But Rainsford and Moreton, who only were in Court, judged it well enough.

John Wooton versus Penelope Hele. Vide Mich. 21 Rot. 210.

Dbenant upon a fine. The Plaintiff declares, That Inhereas quidem finis se levavit in Curia nuper pretens. Custodum libertatis Anglia authoritate Parliamenti de Panco apud Westmonnast',&c. a die Sancti Michaelis in unum mensem anno Domini, 1649. Coram Olivero St. John, Johanne Pulison, Petro Warburton, & Leonard' Atkins, Justic, &c. inter præd. Johannem Wotton, &c. quer' & præd' Johannem Hele, & Penelopen Hele per nomina Johannis Hele Armigeri, & Penelopes uxoris ejus deforc inter alia de uno Meisuagio, &c. Per quem finem præd' Johannes Hele & Penelope concesserunt præd. tenementa præd. John. W. habendum & tenendum, &c. pro termino 99 annorum proximorum post decessium Gulielmi Wootton, &c. fi Johannes Wootton modo querens & Gracia Wootton tamdiu vixerint, aut corum Alter tamdiu vixerit, & præd' J. H. & Penelope & hæred. ipsius Johannis Warrant præd. Jo. W. præd' tenementa, &c. Contra omnes homines pro toto termino præd. prout per Recordum finis præd. &c. plenius apparet. Virtute cujus quidem finis præd. J. W. fuit possessionat de interesse præd. termini, &c. & sic inde possessionat existens præd' Gulief W. &c. postea, scil. sexto die, &c. obierunt, post quorum mortem præd. J.W. in tenementa præd. &c. intravit & fuit inde possessionat, &c. sic inde possesfionat existens præd. J. H. postea, scil. &c. obiit & præd. Penelope ipsum supervixit & idem Johannes W. in facto dicit quod quidem Hugo Stowel Armiger, post commensationem termini præd. & durante termino illo & ante diem Impetrationis hujus Billæ, scil. &c. habens legale jus & titulum ad tenementa præd. &c. in & super possessionem termini præd. ipsius J. W. in eifdem intravit ipsumq; J. W. contra voluntatem ipsius J. W. per debitum Legis processum a possessione & occupatione tenementorum præd. ejecit, expulit, & amovit, ipsumq; J. W. sic inde expuls a pollessione sua inde custodivit & Extra tenuit

& adhuc Extra tenet. Contra formam & effectum finis & warrant præd. & sic idem præd. J. W. dicit quod præd. Penet post mortem præd. J. W. licet sepius requisit, &c. Conventionem suam præd. Warrant præd. non tenuit sed infregit, sed J. H. eidem J. W. tenere omnino recusavit & adhuc recusat ad dam. &c. 600 l. The Defendant pleads, Representando quod eadem Penelope conventionem suam Warrant præd. a tempore levationis finis præd. ex parte sua custodiend. hucusq; bene & fideliter custodivit, representandoq; quod præd. Hugo Stowell præd. tempore intrationis ipfius Hugonis in tenementa præd. non habuit aliquod Legale Jus aut titulum ad eadem tenementa, &c. pro placito eadem Peneř dicit, quod præd. H. Stow. ipsum Johannem a possessione & occupatiane tenementor. non ejecit, expulit, & amovit, prout præd. Johannes superius verfus eam narravit, & hoc parat est verificare. Apon this iffue was taken, and a Clerdict for the Plaintiff was found, and 300 l. damages. And upon a motion in arrest of Judgment, the Canle was spoken to three or four times.

Jones pro Defendent. 1. It is considerable, whether an Action will lie against a Feme upon a Covenant in a Fine levied by her, when Covert-Baron. It would be inconvenient that Land thould be unaltenable, and therefoze the Law enables a Feme Covert to levy a Fine. Which fine shall work by Estoppel, and pass against her a good Interest. But to make her liable to a personal Action thereupon, to answer damages, ec. it were hard, and it is Casus prime impressio-For the Plaintiff it was faid, there is little question but an Action of Covenant will well lie upon this warranty. The Law enables a Feme Covert to corroborate the Estate she passes, and to do all things incident. If the levy a fine of her Inheritance, the may be vouched, or a Warrantia Chartæ, &c. thereupon be had against her, and so is Roll versus Osborn, Hob. 20. and if the can thus bind her Land, a fortiori the may subject her self to a Covenant, as in the Case at the Bar. If a busband and Wife make a Leafe for years, and the accept the rent after his death, the thall be liable to a Covenant.

This Point was agreed by the Council on both sides, that a Covenant in this Case would lie against her, and so this Court agreed.

Twifd. added, Chatthere was no question but a Covenant would lie upon a fine. Fog (saith he) fealing is not always

necessary to found an Action of Covenant. Thus Covenant lies against the Kings Lesse by Patent, upon his Cobenant in the Patent, though we know there is no fealing by the faid Leffe.

Secondly. It was urged on the Defendants behalf, That the breach of Covenant is not well assigned, for it is not shewed what Title Stowell had. It is not only participially expressed, Habens Legale, &c. but what is faid, is altogether general and uncertain: Jus & Legalem titulum ad tenementa præd', so that the breach affigned is in effect no more but that Stowell entred, and so the Covenant was broken. If a man plead Indemn. Conservat, he must them how. Gyll. versus Gloss. Yelverton 227. 8. 2 Cr. 312. Debt foz Rent on a parol-Leafe, the Defendant pleads, That the Plaintiff nil habuit in tenementis prædictis, unde dimissionem prædictam facere potuit. The Defendant replies, Quod habuit, &c. in general, without thewing in special what Estate be hav, that so it might appear to the Court, that he had lufficient in the Lands whereout to make the Leafe; and therefore the Replication was adjudged naught. It is true, it was adjudged, That after the Aerdia, it was helped by the Stat. of Jeoffails. But that I conceive was, because the issue, though not very formal, yet was upon the main point, viz. Whether the Lesson had an Estate in the Tenements of no. For the true reason why a Aerdict doth bely in such a Cale, is, because it is suppoled that the matter left out, was given in Evidence, and that the Judges viv direct accordingly; or else the Aerdia could not have been found. So in our Cale, If the iffue had bien, Whether Stowell had Right, ac. it might have been supposed and intended by his special Title and Estate made out and proved by trial. But here the isue going off on a Collateral point, it cannot be intended, that any fuch matter was given in Evidence.

Jones and Pollexfen for the Plaintiff. This Objection is against all the Precedents, by which it appears, that alledge ing generally as we do, habens Legale Jus & Titulum is good. It is lufficient for a man to alledge, that the Covenantor had no power to demile, of was not leized, ac. without thew. ing any cause why, or that any other person was seized, ac. Co. Eat. 117.2. 9 Co. 61. 2 Cr. 304. 369. 70. It it to be inquired upon Ebidence, Albether the party had a good Citle or no, and so the Court agreed.

Thirdly,

Thirdly, Saunders for the Defendant said, Though the Plaintiff was very warp, beinging in the Right of Stowell with a Participle only, so that we could not take iffue upon it; we could only protest: pet I agreed, that having taken iffue upon one Point, we must admit, and do admit the rest of the matter in the Declaration. Hut that is only as it is alledged. Row here therefore we must admit, that Stowell had Right and Title, ce. But we do not admit that he had a Title precedent to this fine, or had right otherwise than from and under the Plaintiff himfelf; for that is not alledged. And it shall never be intended, no not after Gerdict, that Stowell had good and Eigne Right and Title, before the Leafe granted by the Kine, but the contrary thall be intended. And for that I rely upon Kirby versus Hansaker, 2 Cr. 315. Judges of C. B. and Scace in Cam. Scace in Point. May that is a Aronger Cafe than ours is. For there the iffue which was found for the Plaintiff, was, that the Recovery by Effex, who answers to Stowell in our Case, was not by Covin, but by lawful Title. And yet, because it was not alledged, that he bad a good and Eigne Citle, it was held to be it, and not belped, and the Judgment was reverled. The faying that Stowell ejected him, et. Contra formam & effectum Finis & Warrant præd', og if it had been Contra formam & effectum Conventionis præd', is ablurd, and helps nothing. Stowell could not do to, because he is not party to the Fine.

Jones for the Plaintiff. It can never be intended that Stowell entred, et. by a Title under us, because it is alledg'y to be Contra formam, & effectum Finis & Warrant' præd', & Contra voluntatem ipsius J. W.& eum a possessione sua Custodivit, &c. had it been by Lease under us, the Defendant should have pleaded it. I doubt whether the Defendant could have demurred. But certainly, now the Jury have found all this, it can never be intended as they would have it: as to the Case, that has been cited, between Kirby and Hansaker; I say it is not so clearly alledged there, as here: It is not said there, that the Lesse was possesson, and that the Recoveroz entred into, and upon his Possessions; and ejected him.

2. These words Contra formam, &c. are not in that Case.

3. In that Case the Court of kings Bench was of Opinion, That the Aerosic had made it good.

4. The Roll of that Case is not to be found, here is a man

will

will make Dath that he hath fearched four years befoze and after the time when that Cale is supposed to have been and cannot find it.

Rainsford and Moreton were at first of Opinion, That the Aerdict had helped it. For saith Rainsford, If Stowell had Title under the Plaintist, it could not have been found, that there was a breach of Covenant. But afterwards they said, that Kirby and Hansaker's Case came so close to it, that it was not to be avoided, and they were unwilling to make new Presidents.

Twilden. That Book is so express'd, that it is not an ordinary authority, it is not to be waved. But I was of the same Opinion, befoze that Book was cited. Foz here it is possible Stowell might have a Lease from Wootton since the Fine. Row the warranty both not extend to Puisse Titles. The Defendant hould have faid that Stowell had Priorem Titulum, &c. when a good Title is not let forth in the Declaration to entitle the Plaintiff to his Action, it shall never be helped. There was an Action upon the Stat. of Monopolies, for that the Defendant entred, I suppose, by pretext of some Monopoly-Commission, &c. & detinuit certain goods. But it was not faid, they were his the Plaintiffs, and though we had a Aerdia, yet we could never have Judgment. In 3 Car. there was an Action brought upon a 1929mise to give so much with a Child, quantum daret to any other Thild; and it was alledged, that dedit so much, and because that that it might be before the time of the promise. it was held naught after Merdict.

It may be the Roll of Kirby versus Hansaker is not to be found, no moze than the Roll of Middleton versus Clesman, repozted, Yelv. 65. But certainly Justice Crook and Yelverton were men of that Integrity, they would never have repozted such Cases, unless there had been such. There are many losses, miscarriages and missakes of this kind. Papy, where will you find the Roll of the Decree sozicities in London, pet I have heard the Judges say, They versly believe it so upon a mong Roll.

is upon a wong Roll. Nil Capiat per Bill.

Rex versus Neville.

I Moidment for ereding a Cottage for habitation contra Stat.
qualit, because it was not said, That any inhabited it. For else it is no offence, per Rainsford & Moreton, qui soli aderant.

Jemy versus Norrice.

Attlett of Errour was brought of a Judgment given in the Common Pleas, in an Action upon a quantum meruit, for Alares fold. First, One of them is unum par Chirothecarum; But it is not said of what sort. Twisden. It is good enough however, so it has been deld de Coriis, without saying Bovinis, &c. de Libris, without saying what Books they were. Secondly, Another is parcella fili: which, it was said, was uncertain; unless it had been made certain by an Anglice. For though it was agreed it had been good in an Indeb. assumptit, yet in this Case there must be a certainty of the debt. Such a general word cannot be good, no more than in a Trover. Twisden. If an Indeb. assumptit should be hrought for 201. for Alares sold, and no Evivence should be given of an agreement sor the certain price. I should direct it to be found especially. But parcella fili sems to be as uncertain, as paires of Dangings, Cur. It is doubtful. But however, affirmetur nish, &c.

Foxwift

Foxwist & al. versus Tremayneaut, Trin. 21 Rot. 1512. V. Super .---

FD3 the Plaintiff. The two parties, who are Infants, may well fue by Attorney, as they do. The Authorities are clear, 2 Cr. 441. 1 Ro. 288. Weld versus Rumney in 1650. Styles 318. We beg leave to mention especially what you Mr. Justice Twisden said there; though indeed we do not know, not can be very confident that it is reported right. Twifden. I do protest not one word of it true they went about. But 3 Cr. 541. and especially 378. is expels in our Point. In Rot. 288. num. 2. Indeed there is a Quære made, because an Infant might by this means be amerced. But that reason is a mistake, for an Infant shall not be amerced, Oyer 338. I Inft. 127. a. I Ro. 214.

Moreton. I take the Law to be, that where an Infant fues with others in auter droit, as here, he shall sue by Attomey; for all of them together represent the Testator. ground my felf upon the Authopities, which have been cited, and Yelv. 130. Also it is for the Infants advantage to sue But if he be a Defendant he may appear by by Attorney.

Suardian, Popham 112.

I think the parties may all joyn in this fuit, though perhaps in Hatton versus Maskew they could not: For in that Case it appeared that the wife only, who was Plaintiss, was Executrix. So he concluded, that Judgment ought to be

given for the Plaintiffs.

Rainsford accordant. This Cale is stronger than where a fingle person is made Executor or Administrator. For though Ro. 288. num. 2. makes a Quære of that, yet Num. 3. which is our Cale, he agrees clearly with the Countess of Rutlands Case, in 3 Cr. 377. 8. That the Infant as well as the other Executors thall fue by Attorney. The Reasons objected on the contrary are, That an Infant cannot make an Attorney, and that he may be prejudiced hereby. I answer, That the Executors of full age have influence upon the Infants, and they are entrusted to other and manage the whole buv. 1 Lcon 74. finels. And therefore Administration durante minoritate shall not be granted, so in this Case, he shall have priviledge

V. 5 Co. 29. 6 Co. 67. 6.

to sue by Attozney, because he is accompanied with those which are of full age. I conclude, I have not heard of any Authozity against my Opinion: and how we can go over all

the Authorities cited for it, I do not know.

Twisden contra. This is an Action upon the Case, for that the Defendant was indebted for damages clear received to the Testator's Ase. And indeed, I so not lie otherwise, how it would lie. Two questions have been made: first, Whether all the Executors may, or must foun? I confess I have heard nothing against this, viz. but that they may joyn. But I cannot so easily as my Brothers Aubber over all the Authorities cited (viz.) Hatton versus Maskew, which, I confess, is a full authority for this that they need not joyn. The Tale was thus; The Cestator recovers a Judgment, and dies, making his Will thus. Allo, I device the relidue of my Effate to my two Daughters, and my Wife, whom I make my Erecutric. I confess I cannot tell why, but the Spiritual Court did judge them all, both the two Daughters, as well as the Mife, to be Executrices; and therefoze we the Judges must take them to be so. The Wife alone proves the Will with a reservata potestate to the Daughters, when they should come But this makes nothing at all in this Cafe; I think this is according to their usual form. The Wife alone fues a Scire facias upon this Judgment, and therein fets forth this whole matter, viz. that there were two other Executrices, which were under seventeen, &c. It was adjudged for the Plaintiff, and affirmed in a Wirit of Errour in Cam. Scace, that the Scire facias was well brought by her alone. But first, I cannot see how a Writ of Errour should lie in that Take in Cam. Scace; fog it is not a Cause within 27 Eliz. 2. What reason is there for Judament? a reason may be given, that befoze an Executoz comes to seventeen, he is no Executoz. But I say he is quoad esse, though not quoad Excecutionem. A Mife Administratrix under seventeen shall joyn with her busband in an Action; and why thall not the Infants as well in our Cafe? Yelv. 130. is expels that the Infant must joyn, and be named. It is clear, that no Administration durante minore ætate can be committed in this Cale. For all the Executors make but one person, and therefore why may not all joyn? 2. Admitting they may joyn, whether the Infants may fue by Attorney? I hold that in no Cafe an Infant thall fue or be fued either in his own, or auter droit, by Attorney. 1 Ro. 747. aut. 340. 400. poft. 747.

There are but four ways by which any man can fue; In propria persona, per Attornatum, per Guardianum, and per Prochein amy. An Infant cannot sue in propria persona; That was adjudged in Dawkes versus Peyton. It was an excellent Cale, and there were many notable Points in it. First, It was Refolved, That a Writ of Errour might be brought in this Court upon an Errour in Fact in the Petry Bagg. 2. That the Entry being general (venit fuch a one) it shall be intended to be in propia persona. 3. That it was Erroz for the Infant in that Case, to appear otherwise than by a Guardian. 4. That the Errour was not helped by the Statute In a Cale between Colt & Sherwood, Mich. of Jeoffails. 1649. an Infant Administrator sued and appeared per Guardianum; and it appeared upon the Record that he was above seventeen pears of ace. I was of Council in it, and we musted it was Errour, but it was adjudged, That he appeared as he ought to appear; and that he ought not to appear to Attorney. And the Reasons given were; first, Because an Infant cannot make an Attomey by reason of his inability. Secondly, Because by this means an Infant might be amerced pro falso Clamore. For when he appears by Attorney non constat; unless it happen to be specially set forth, that he is an Infant, and so he is amerced at all adventures; and to relieve himself against this be has no remedy, but by a Writ of Errour. For Errour in Fact cannot be affigue ore tenus. And it were well worth the Cost to bring a Wirit of Errour to take off an amercement.

But it is said, That the Infants may appear by Attozney in this Case, because they are coupled and joyned in company with those of full age. I think that makes no difference, so that reason would make such appearance good, in case that they were all Defendants. But it is agreed, That if an Infant be Defendant with others who are of full age, he cannot appear by Attozney. The reason is the same in both Cases. If an Infant and two men of full age joyn in a feosiment, and make a Letter of Attozney, ac. this is not good, not can in any soft take away the imbecility which the Law makes in an Infant.

I conclude, I think the Plaintiss ought to joyn; but the Infants ought to appear by Guardian. But since my two Brothers are of another mind, as to the last Point, there must be Judgment that the Defendant respondent ouster.

Nota

Nota, Coleman argued for the Defendant; his Argument, which ought to have been inferted above, was to this effect: First, These five cannot joyn; had there been but one Erecutoz, and he under seventeen years, the administratoz durant minor, &c. ought to have brought the Action, 5 Co.29.a. But fince there are feveral Erecutors, and some of them of full age, there can be no Administration durant' minor. Those of full age must Adminster for themselves, and the Infants to. But the course is, that Executors of full age prove the will, and the other, that is under age, shall not come in till his age of seventeen years. But now the question is, how this Action thould have been brought? I say according to the President of Hatton versus Maskew, which was in Cam. Scacc, Mich. 15 Car. 2. Rot. 703. wherein the Executor who was of full age brougt the Scire fac, but let forth that there were other two Erecutors who were under age, and therefore they which were of full age pay Judgment. It was refolved the Scire fac was well brought, and they agreed, That the Cales in Yelverton 130. was good Law; because in that Case it was not set forth specially in the Declaration, that there was another Executor under age. So that they Resolved, That the Executor of full age could not bring the Action without naming the others. 2. Dowever the Infants ought to fue by Guardian, and where Rolls and other Books lay, that where some are of age, and some under, they may all sue by Attorney: It is to be underfrood of such as are indeed under 21, but above 17. Respondeas ouster.

After this the Suit was Compounded.

Qq 2 Term.

Term. Pasch. 22 Car. II. Regis.

The great Case in Cancellaria, between Charles Fry and Ann his Wife, against George Porter.

Refolved,

That there is no Relief in Equity against the Forfeiture of Land limited over by Devise in Marrying, without consent, &c. Many particulars concerning Equity.

the Case was; Montjoy Earl of Newport was seized of an house called Newport-house, &c. in the County of Middlefex, and had three Sons, who were then living, and two Daughters, Isabel married to the Earl of Banbury with her fathers concent (who had iffue A. the Plaintiff) and Ann married to Mr. Porter, without her Fathers Consent (who hav iffue D.) both these Daughters The Earl of Newport made his Will in this manner: I give and bequeath to my dear wife the Lady Ann Countels of Newport, all that my Doule called Newport-house and all other my Lands, ac. in the County of Middlefex, for her life. And after her death I give and bequeath the premiffes to my Grand-child Ann Knollis, viz. the Plaintiff, and to the heirs of her body. Provided always, and upon condition that the marry with the confent of my faid wife, and the Earl of Warwick, and the Carl of Manchester, og of the majog part of And in case the marry without such consent, or happen to dpc without Mile, Then I give and bequeath it to George Porter, viz. the Defendant. The Carl oped. Ann the Plain: tiff married Charles the Plaintiff, the being then about fourteen or fifteen years old, without the confent of either of the Trustees. And thereupon now a Bill was preferred to be relieved against this Condition and Forfeiture, because the had

no notice of this Condition and Limitation made to her, ac. To this the Defendant had demurred, but that was overruled. Afterwards there were leveral Devolitions, ac. made and testified on each side, the effect of which was this. On the Plaintiffs part it was proved by feveral, that it was always the Earls intention, that the Plaintiff thould have this Effate, and that they never heard of this purpole to put any Condition upon her; and believed that he did not intend to give away the Inheritance from her. But that this Claufe in the Mill was only in terrorem, and Cautionary, to make her the moze obsequious to her Grandmother. The two Earls swore that they had no notice of this Clause in the Mill; but if they had, they think it possible such reasons might have been offered, as might have induced them to give their confents to the Marriage; and that now they do consent to, and approve of the Some proof was made, that the Countels of Newport had some belign that the Plaintiff hould not have this Effate, but that the Defendant hould have it. But at last even the, (viz. the Countels) was reconciled, and bid declare that the forgave the Plaintiffs Parriage, and that the thewed great affection to a Chilo which the Plaintiff had, and directed, that when the was dead, the Plaintiff and her Child thould be let into the possession of the premisses, and should enjoy them, ac. It was proved also, that when there had been a Treaty concerning the Marriage betwen my Lord Morpeth and the Plaintiff, and the Plaintiff would not marry him, her Grandmother faid the thould marry where the would; the would take no further care about her, (the Countels was dead at the time of this Suit:) It was proved that Dr. Fry was of a good Family, and that the Defendant had 5000 l. appointed and probided for him, by his Grandfather, by the fame Will.

On the Defendants part, It was swozn by the said late Countels of Newport, viz. In an answer made formerly to a Bill brought against her by the now Defendant for preferring preferring of Testimony (which was ordered to be read) that the Warriage was private, and without her confent and approbation, and that the did not conceive it to be a fit and proportionable Marriage, be being a pounger Brother, and habing no Effate.

The like was (worn by the Earl of Portland, the faid Counteffes then Dusband, and that it appeared the leapt over a Wall (by means of a Wheel-Barrow fet up against it) to go

to be married, and that as foon as the Truste's did know of the Parriage, they did disabow and distike it, and so declared themselves several times, and said, That had they had

any hint of it, they would have prevented it.

Others swoze that the Earl of Portland veclared upon the vay of her going away, That he never consented thereto, and that the Countess desired then, that he would not do any thing like it, and that the Earl of Warwick said, he would have lost one of his Arms rather then have consented to the

faid Marriage.

On hearing of this Cause befoze the Master of the Rolls, viz. Sir Harbottle Grimstone, Baronet, the Plaintist obtained a decretal Dider, (viz.) That Anne the Plaintist and her Deirs should hold the Premisses quietly against the Defendant and his Deirs, and that there should be an Injunction perpetual against the Desendant, and all claiming under him.

and now there was an Appeal thereupon, and re-hearing before Sir Orlando Bridgman, Knight, then Lord-Keeper, affifted by the two Lord Chief Justices, and the Chief Baron.

before whom it was argued thus:

Serjeant Maynard. The Plaintist ought not to have relief in this Case. The Plaintists Pother had a sufficient provision by the Earl of Newport's Care. And therefore there is less reason that this Estate should be added to the Daughter. The noble Lords, the Truste's, when the thing was fresh, did disapprove the Parriage, however they may consent thereunto now. The Devise was to the Plaintist, but in tail, and afterwards to the Defendant. We disparage not Mr. Fry in blood, nor family; But people do not marry for that only, but sor Recompence and like fortune.

There was a publique fame or Report (it is to be prefumed) of this Will in the houle; and were there not, yet it was against her Duty, and against Nature, that she should becline, asking her Grand Pothers consent; and Mr. Fry in Ponour and Conscience ought to have asked it; And therefore this practice ought not to receive the least encouragement in Equity. 'Tis true, when there was a Demurrer, it was over-ruled, because the Bill prayed to be relieved against a forfeiture, sor which there might be good cause in Equity. But now it does not appear there is any in the Case. The Estate is now in the Defendant, and that not by any act of his own, but by the Devisor and the Plaintiss, this is a Limitation, not a Condition. For my Lord Newport had Sons; It is somewhat of the same estect with a Condition, though it is not so. The have a Citle by the Will of the dead, and the act of the other party, without fraud or other act of us, and therefore it ought not to be defeated.

I take a difference between a device of Land and money. For Land is not oxiginally devilable, though Money is. the Civil Law, and amongst civil Lawyers, it has been made a question, Whether there shall be Relief against such a Limitation in a Device. But be that how it will, Chattels are small things, but a freshold setled ought not to be devested thus. No man can make a Limitation in his Will better and stronger to disappoint his Devile, conditionally than this If my Lord Newport had been alive, would be is made. have liked luch a practice upon his Grand daughters as want of Motice? In Organ's Case and Sir Julius Cæsar's Case, there was a Grant to an Infant, on condition to pay 10s. and no Motice given thereof befoze 'twas payable; pet because no body was bound to give notice, it was adjudged against the Infant.

Sir Heneage Finch Solicitor General. The Witnesses who tweat that the Earl Caid, he would give the Estate to her, prove nothing to the purpole. For he did so, but upon a condition, That they did not hear. The after consent of the Earls of the Countess ought not to make it good; which consent at last perhaps was errorted by importunity of compassion. For at first they disapproved the Parriage. Parrying without consent, and dring without issue, are coupled in the same Line, and the Estate shall as essentially pass over to the Defendant upon the one Limitation as the other.

For such consent is matter ex post facto, and suspitionshy to be scan'd; for we ought in this Case by Law to proceed strictly, and not decogate from my Lord Newport's intent, which plainly appears by the letter of his Will, that his Grand Child should ask consent of such, he had thereby appointed to consent before her Darriage were solemnized, the actual solemnization of which was an act so permanent, that it would admit of no alteration or dissolution: An act of such sorce and efficacy, tending clearly and immediatly to the ruine of their Right and Title to the Estate in question, and rendring

rendring it wholly uncapable of Reviver by any other means than what the Common and Civil Laws of this Realm do The post-consent therefore will not avail the Plaintiffs in this Court. Otherwife the Defendant claiming by this Limitation, should have indeed advantage, but such as is inconsiderable, being liable to alteration by the pleasure of this Court. And for a first observation of the Testators words, the same ought to be in Equity as well as at Law. What great respect the old Heathens paid to the Wills of deceated perfons may appear in thefe following Aerles.

> Sed Legum Servanda fides, suprema voluntas, Quod mandat, fierig; jubet, parere necesse est.

The Countels laying likely in passion, That the might marry whom the would, ac. did not amount to a dozmant Marrant to her to marry without consent. I am upon Consecure still, that the Plaintist will insist upon these particulars, for it looks as if they would, because they read them. Doubtless the primary intention of the Clause was in terrorem. But the Secondary was, that if the offended, the thould undergo the penalty. Dis intention is to be gathered out of the words only, and what ever they fay the Earl intended, does not press the Question. Dur Free-hold is fetled in us by bertue of an Act of Parliament. I lay it down for a Founda-tion. That a Father may settle his Estate; so as that the Iffice thall be deprived of it for Disobedience, and not be relievable in Equity. And now 'tis not possible that any Council could advice a man to do it stronger than it is done in this Cafe. And thall a Child break these Bonds, and look Disobedience in the face here? If it had been only provided that the thould marry with the confent, ec. and no further, it might have been somewhat: But since he goes on, and makes a Limitation over, ec. he becomes his own Chancellour, and upon this difference are all the Presidents, and even those of devising portions, (viz.) devising them over or not, as I have understood. Infancy can be no excuse in case of the breach of a condition of an Estate, in which the Infant is a Durchafog. So that nothing reffs now in this Cafe but the point of Notice. And why should not the Infant be bound to take notice in this Case, as he is to take notice in case of a Remainder, wherein he is a Purchalog? But if notice be

V. t Cr. 476. post 694.696.

be necessary, it is not to be tried here now. If we had brought an Ejectment, and (supposing notice had been necessary) we had failed in the proof thereof, should we have been bar'd for ever as by this perpetual Injunction we should be? and shall it be done now without proof? If we are not bound to prove Wotice at Law, much less are we bound to prove it here. This Case is Epidemical, and concerns all the Parents of England that have or thall have Children, that the Obligations which they lay upon their Children may not be cancelled wholly, and this Court (under colour of Equity) protect them in it, and be a City of Refuge for relief of fuch; the foulness of whole actions deny them a Sanduary.

Pecke. If Infancy would excuse, such a Clause would fignifie nothing. For most persons especially, of that Ser, marry before full age. The Lords give no reason why they

changed their Opinions.

Serjeant Fountain. Yelverton's Case in 36 Eliz. is a 1922. Gro: Cliz. 401 fident in the Point for us, and Shipdam's Cafe is much like it. This being of a device Land, and that of Money, which if it were paid, the Land was to go over. The grand Dbjection is, That here is an Effare Beffed by a fettlement. which is not to be avoided or defeated. But I doubt whether a man can lay such a Restraint, that there shall not be Relief in any case of Emergency and Contingency. It is Part 712. 3. a part of the fundamental Justice of the Mation, that men v. in Leo. 37. should not make Limitations wholly unalterable; as by the Common Law men cannot make a fee unalienable. Pou give relief every day where there are expels Claufes, that there thall be no relief in Law or Equity, where a thing is appointed to be, ac. without relief in Law of Equity, you relieve against them, and look upon them to be void. In our Tale, suppose the had married a great Lord, or suppose a perfon had brought notice of the Trustees consent? would you not have given relief? But secondly, I deny the Assumption. This Cafe is not fo. I agree it had been well done if they had askt my Lady Newports confent. But is there a word in the Will, that if the Plaintiff oid not, he thould have no relief in Equity? The Estate was devised to my Lady Newport during her life (fo that the Plaintiff could not be in possession) and the might have lived till the Plaintiff was 21 years old. Could not my Lady Newport have fait, Have a care how you marry,

for you forfeit the Estate, if you marry without the consent of two of us three? All Ingredients and Circumstances must be taken in a matter of Equity. Is it an argument to say, be has no Estate? therefore take away his Wises Estate.

then there will be nothing to maintain her.

It is agreed, That if the Approbation had been precedent, it had been well. Now the had no notice before the Parriage, that it was necessary, and when the had that notice, the got the approbation, and that though subsequent, is good enough, because it was askt (and gotten) as soon as the had Motice, that the ought to have it. The Will is hereby sufficiently observed, so the intent of the Will was, that the thouse have such an susband as those persons should approve, and this marriage is so approved. I rely upon this

matter, but especially upon the word of Notice.

Serjeant Ellis. There was a Cafe of a Proviso not to marry, but with the confent of certain persons first had in writing. Confent was had, but not in witing, and pet you rul'd it good. Dad this been a Condition in Law (as 'tis in fact) the Law would have belped her. If the Estate had been in her, there might have been some reason that the should have taken notice how it came to her (and of the Limitation. ec.) bad the Carl been alive and confented to the Parriage, after it was folemnized, he would have continued his affection, and the Plaintiffs have had the Effate fill. Thy now. the consent of the Lozds and Countels, is as much as his consent: he had transerred his consent to them. This is a Ratihabitio, you cannot have a Cafe of moze Circumffances of Equity: 1. An Infant. 2. No notice. 3. Confent after. 4. Their Declaration that they thought my Lord meant it in terrorem, &c. What if two of the Truffers had vied, should the never have married? surely you would have relieved her.

Serjeant Baldwin. Here is as full a consent to the Partiage, as could well be in this Case. For since the Plaintist had no notice of the necessity of the Earls consent before the Partiage, it had been the strangest and unexpected thing in the world, that the should have gone about to have askt it. The Peir should not have taken notice of such a Forseiture; and why should a man that is named by way of remainder? In case of a personal Legacy, this were a void Proviso by the Civil Law. For I have informed my self of it.

It is a Daxim with them, Matrimonium esse Liberum. This amounts to as much as the Condition, that the person should not marry at all. Fox when 'tis in the Trusses power they may propose the unagreeablest person in the World; 'tis a most unreasonable power, and not to be savoured. Sir Thomas Grimes setled his Land so, that his Son should pay portions; and if he did not, he demised the Lands over, and it was adjudged relieveable.

If I limit that my Daughter thall marry with the consent of two, ac. if each of them have a delign for a different Friend, if you will not relieve, the can never marry.

Is it not more probable, that if the Carl had lived he would rather have given her a Maintenance, than have concluded her under perpetual missortune and disherison?

Keeling Chief Justice. I do not see how an averment of proof can be received to make out a mans intention against the words of the Mill. In Vernon's Case, though it were a Case 4 Co. 4.4. of as much Equity as could be, it was denied to be received; Plo. 345. and so in my Lord Cheney's Case. Here was a Case of Sir Thomas Hatton somewhat like this Case, wherein no Relief could be had.

Vaughan Chief Justice. I wonder to hear of citing of Presidents in matter of Equity. For if there be equity in a Case, that Equity is an universal Cruth, and there can be no President Vi. 1 In. 2164 in it. So that in any President that can be produced, if it be the same with this Case, the reason and equity is the same in it self. And if the President be not the same Case with this, it is not to be cited, being not to that purpose.

Bridgman Lord-Keeper. Certainly Presidents are very necessary and useful to us, for in them we may find the reasons of the Equity to guide us, and beside the authority of those who made them, is much to be regarded. The shall suppose they did it upon great Consideration, and weighing of the matter, and it would be very strange and very ill, if we should disturb and set aside what has been the course for a long Series of time and ages.

Thereupon it was Didered, That they should be attended with Presidents, and then they said they would give their Opinions.

Rr 2

Three

Three weeks after they came into Chancery again, and delivered their Opinions Seriatim, in this manner, viz.

Hale Chief Baron. The general question is, whether this Decree thall pals. I thall divide what I have to lay into thele three questions or particulars. first, I thall confider whether this be a good Condition of Limitation, of conditional For fo I had rather call it. It being a Condition to determine the Effate of the Plaintiff, and a Limitation to let in the Defendant. I think it is good both in Law and Equity, and my reasons are; first, because it is a collateral Condition to the Land, and not against the nature of the Effate, and the is not thereby bound from Parriage.

Secondly, it obliged her to no moze then her duty; the had no Dother; and in case of Barriage the ought to make anplication to her Syandmother, who was in loco Parentis; and fince the Estate moved from the Grandfather, she was Wistris of the disposition and manner of it. 'Tis true by the Civil Ecclesiastical Law, regularly such a Condition were void. and therefore, if the question were of a Legacy, there might be a great deal of reason to question the validity of it, because in those Courts wherein Legacies are properly handled, it would have been void. But this is a case of Land. (Devise) Indeed it is agreed, that this is a good Condition, and not to be avoided in it felf.

Secondly. This being a good Condition and Limitation The Queffion is, whether there be relief against it in Equity, admitting it were a wilful breach? I think there ought not to be any. I differ from the reasons pressed at the Bar; as first, That it was a device by Will, by virtue of the Statute, ac. but that doth not flick with me. For if there map not be a relief against a breach of a Condition in a Will, there would be a great thatter and confusion in mens Estates, and some of those settled by great advice, and there have been Presidents of relief in such cases, 2 Car. Fitz versus Seymour. and 10 Car. Salmon versus Bernard. Secondly, It has been urged, there hould be no relief, because there is a Limitation over. But that I shall not go upon neither. There have been many reliefs in iuch Cafes: I will decline the latitude of the Objection, for that would go a great deal further then we are aware. But yet I think there ought to be no relief in this Cafe: It is not like the cafe of payment

of money, because there the party may be answered his debt with damages at another day; and so may be fully satisfied of all that is intended him. But here my first reason is, That it is a Condition to contain the party in that due Obedience,

which Law and nature require.

(2) 'Tis a voluntary settlement to the Grandaughter in tail, and the remainder over is so too; and both these parties are in aguali gradu to the Devisor; and therefore their being both in a parity it would be hard to take the Estate from him, to whom, and in whose Scale the Law hath thrown the advantage.

(3) It appears by the body of the Will, that the Earl did as really intend it should go over, if the married without confent, as if the vied without Islue: for they are both in the same clause. There may be as much reason to turn it into a feesimple, in case as the had died without Issue, as in this case. For so I doubt the penning of this decretal Order does.

and (4) I rest upon this, It is a Cafe without a President. I remember after that Lanyett's Case had been adjudged that 6 Car. there was a Cafe, I suppose Saunders versus Cornish, of a Limitation in Tail; and then a device over, and it was adjudged void. And the Judges laid, so far it is gone, and fo. 230 it was we will go no further, because we do not know where it will of a Lease for rest. I know there is no intrinsical difference in Cases by years, and so But there is a great difference in a Cafe, where void. Dielidents. in a man is to make, and where a man fees, (and is to follow) a President; in the one Case a man is more strictly bound up, but in the other he may take a greater liberty and Latitude. For if a man be in doubt in æquilibrio concerning a Case, whether it be equitable or no, in prudence be will determine according as the Presidents have been, especially if they have been made by men of good authority for Learning, ec. and have been continued and purfued. Dere muft be fome boundary, or we shall go we know not whither. It were hard a Court of Equity hould bo that that is not fit to be done in any Court below a Parliament. The Prefidents Do nat come home to the Case. Wost of them are in case of money Legacies; and in some of those Tales we may give allowance, in respect of the Law of another forum, to which they belong. But this is in case of Land only, vid' Swynborne 4. Co. 12. chap. indeed he is no authority, but there is a bery good Eremplification of this matter.

(5) 3

(5) I shall consider the allays and circumstances which are observed, and offered to qualifie this Case, and induce relief.
(1) Tis said that this clause was only in terrorem, and some Wished how collateral averments can be admitted in this case. For then how can there be any certainty? A Will will be any thing, every thing, nothing. The Statute appointed the Will should be in writing to make a certainty, and shall we admit collateral averments and proofs, and make it utterly uncertain?

(2) 'Tis said in this Tale, the effect of the Proviso has bin obtained, for the Trustees have now declared their consent.

I must say it is not full, for they do not say they would have confented; but that possibly such reasons might have been offered as they hould have done it. And possibly I say not. They, like good men, have only declined the thewing an ineffeaual contradicting of a thing which is done, and cannot now be recalled, undone of altered. Besides, if there had been but a circumstantial variation, the consent afterwards might bave been somewhat. But here it is in the very substance. In the Case befoze cited at the Bar by Mr. Serjeant Ellis, where the consent was to be had in writing, and it was had only by Paroll, there was great Equity that it sould be relieved, because it was only a provident circumstance, and wisdom of the Deviloz, viz. for the more firme obliging the party to ask consent, which the Devisor considered might be pretended to be had by flight words, in ordinary and not folemn Communication, or elfe in passion and heat, (as in this case when the Plaintiff would not consent to the approved Warriage with the Lord Morpeth, the Countels faid the might marry where the would. Which words imported a neglect of care for the future over the Plaintiff, because the would not be ruled by the Countels in accepting the tender of fo commendable a Marriage;) as also for the benefit of the Devisee (in the Cale afozelaid) That in cale the Devilee did marry with the consent of the Trustee, he might not after (through prejudice, ec.) aboid it by benial of fuch confent, and so befeat og perplex the Devicee fog want of proof of such his confent.

(3) Tis faid the party is an Infant. Why, an Infant is bound by a Condition in Fact, by Law: 'tis true, we are how in Equity; But in Equity, fince this refers to an Act which

2 Cro 145.

which she, though an Infant, is capable of voing, viz. to marry; it were unreasonable that she should be able to do the Act, and not be obliged by Equity to observe the Conditions and Terms which concern and relate to that Act. So that it is all one, as if she had been of full age. The Statute of Merton cap. 5. provides, that Usury shall not run against Infants, and yet the same Statute cap. 6. appoints, That if an Infant marry without the Licence of his Lord, &c. he shall forseit double the value of his Marriage: and it is reasonable, because Parriage is an Act which he may do by Law while he is under

ace.

(4) As to the point of Notice: (1) Whether Notice be requisite or no, in point of Law, I will not determine. But I muft needs fap, that it must be referred to Law. But (2) If it be not requilite in Law, how far a Court of Equity might relieve for want of it, I will not now take upon me to determine. I will not trench upon matters Gratis, of which I know not what will be the consequence. But I conceive in this case, the Fact is not yet settled, whether there were (notice) oz not; and it were a hard matter, That because no Notice is here probed, it sould be taken for granted there was none. For here are several circumstances that feem to shew there might be Notice: and a publick voice in the house, or an accidental Intimation, &c. may possibly be sufficient Notice. I shall therefore leave it as a fit thing to be treed, and till that, the case in my understanding is not ripe. And therefore I will add no more. I think this Decree ought to be altered, if not let aside. But as this Case is, there ought to be no relief.

Vaughan Chief Justice. I shall conclude as my Lozd Chief Baron did, That as this case is, there ought to be no relief. I will single out this case from several things not material to it, as my Lozd Chief Baron did, &c. I think, if Land be devised on Condition to pay Legacies, and that the Devisee has paid almost all, and fails in one oz so, there may be good cause of relief, because he has paid much, and is somewhat in the nature of a purchasoz. This is not like a Legacy, This is upon the Statute. Where it is said a man may Devise at

his Will and pleasure, i. e. absolutely, upon Condition, upon Limitation, or any way that the Law warrants. Suppose there had been a special Act of Parliament disposing as the Earl has done, in this cale could there be any colour in Equity, to alter or vary this Law? And here 'tis equally as concluding as that, fince the Statute gives a man power to difpole as expresly, and otherwise Equity would alter and dispole of all property, and all things that came in question. But let Notice of Consent, &c. be requisite, of not, 'tis Tri-But I fand upon this, that there ought to be able at Law. no relief in Equity. It was inlifted, that her Grandmother gave a kind of consent: but I take that soz nothing; for though the Handmother would not have offered or proposed a Marriage, pet the ought not to marry without her consent. Moz is the Lozds Post-Consent any thing, for consent cannot be had for things which cannot be otherwise, as a man cannot be faid to consent to his Stature, of the colour of his hair, ec. A man may know of what Opinion be is, or was; but 'tis impossible for a man to know of what Opinion he would have been in the circumstances of Action, which he never try-I conclude, the Plaintiff ought not to have relief in E-But if any matter in Law will help them, they are not excluded from it.

Keling Cheif Justice. I think there ought to be no restef in this Tale; I have considered it as well as I can, and I think nothing is moze sit to be observed then thief Tustomary Rules for Children, they are very good restraints for Children, and ought to be made good here, to encourage obedience and discourage those who would make a Prey of them; and if there were not hope for men, to hasten their fortunes by this means, there would be sew adventures of this nature; I have lookt upon the Presidents, sc. and I find they come not to this Tale, except only one and that is but seden years old, and the other are for money, for which there is reason, because the party may be substantially relieved and satisfied otherways. It there had been no limitation over there may be some reason why it may be intented, that it was only in terrorem.

I do not think all Cales upon Wills are irremediable here (because of the Statute.) If the breach of the Condition be in a circumfiance only, as in the Case, where the consent was given, but not in writing, as it ought, it may be relieved, for that was a caution to the Consentor, that he should not

give

give concent before strangers, and trust to the swearing of a parol-confent. I never pet faw any device obliging to have any fuch confent after the parties age of 21 years, fo that there is no great hardhip in it. And if there should be any ill design in those who have the trust and power to consent in with holding their consent, it might be relieved here. I think none would make a decree, that if the died without issue, the Defendant thould have it, and this is the same : But equity can never go against the substantial part of a Conveyance of Illis, but that must be governed by the parties agreement or appointment. Equity ought to arise upon some collateral or accidental emergent. 'Eis not in Terrorem indeed without a penalty. There can be no collateral Averment. Being an Infant is nothing: for this is only a provision while the is an Infant. Belides, the case of the Forfeiture of the double value is a very good instance for the Notice. If the had notice of this Mill, pet they that came to feal her knew it not: for they did not come to take a thorn theep, and therefore no relief is deferved by the Plaintiff. In Ponetty and Conscience those Bonds ought to be kept firia. I confess, I would not have the Plaintiff tempted to a further Suit, but indeed in faving that I go further then I need.

Bridgeman Lord Keeper. If I were of another Opinion, pet I would be bound by my Lozds; for I did not send for them, not to be bound by them. But I was of their Opinion from the beginning. And I am glad now that we are delivered from a common Erroz, and that men may make such provisions as may bind their Children. But to justifie the Decree a little: (1) Here is 5000 l. appointed to George Porter, (so that the ample provision was made for him, and it may the rather be intended that this Effate was wholly definit ed for the Plaintiff.) (2) Here was a Post-confent, and those perfons were in loco parentum. Row if the Carl had, as possibly he might have, thus pardoned and been reconciled to the Parriage, he would probably have given the Plaintiff the Effate, and that is a reason to induce us to the same. for I think it clear, that an Effate by Act of Parliament is liable to the same Relief, Regulation, ec. as any other Estate. An Effate Tail, though that be by Statute, yet is liable to be cut off, ac. If there had bin a time limited, then there had been more reason to bind her up to have consent.

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But there ought to be a restraint put in these Cases: That of the bouble sozseiture was truly and well observed: Where no body is bound to give Notice, it is to be taken; but besides the is not heir, soz that might have made a great disserence. This I thought not to say. Upon the whole I am of my Opinion with my Lozds, and I am glad I have their assistance.

Let the Bill be dismissed.

FINIS.

A TABLE of the Principal Matters contained in the foregoing REPORTS.

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A.

Abatement.

A Plea may be good in abatement, though it contain also matter, that goes in barr. 214

Accord.

Accord with fatisfaction.

Account.

Pray'd that the Court would give further day for giving in the Account.

Plea in barr, and Plea before Auditors.

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